CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, ET AL., PETITIONERS,

vs.

VIOLET L. MEYER, BOTH INDIVIDUALLY AND AS ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF RAYMOND D. MEYER, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR CERTIORARI FILED MAY 6, 1940.

CERTIORARI GRANTED JUNE 3, 1940.

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Pleas and proceedings in the Supreme Court of the State of Colorado, in causes No. 14155, and 14534.

Be it remembered that heretofore, to-wit: on the 8th day of February, 1939, a writ of error was issued by the Supreme Court of the State of Colorado to the District Court of the City and County of Denver, Colorado, in cause No. 14534 in said Supreme Court, in which proceeding Violet L. Meyer, both individually and as administratrix with the will annexed of the estate of Raymond D. Meyer, Deceased, was plaintiff in error and William B. Milliken, Margaret M. Milliken, Texas Production Company, a Corporation, and The Ohio Oil Company, a Corporation, were defendants in error; that thereafter and on the 21st day of June 1939, a supplemental abstract of record was filed in the office of the Clerk of the Supreme Court of the State of Colorado in said cause by said defendants in error, which said supplemental abstract of record includes everything set out in the abstract of record in cause No. 14155, the assignments of error in cause No. 14155, the supplemental abstract of record in cause No. 14155, the assignments of error in cause No. 14534, and the assignments of cross error in cause No. 14534, which said supplemental abstract of record, as prepared and printed for use of the Supreme Court of the State of Colorado, is in the words and figures following to-wit:

IN THE

Supreme Court

OF THE

STATE OF COLORADO

VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased,

Plaintiff in Error,

vs.

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Defendants in Error.

No. 14534

Error to the District Court within and for the City and County of Denver.

Honorable Robert W. Steele, Judge.

ABSTRACT OF RECORD AND ASSIGNMENTS OF ERROR.

Note: This Supplemental Abstract of Record includes everything set out in the Abstract of Record in Case No. 14155 in this Court, the assignments of error in case No. 14155, everything set out in the supplemental abstract of record in case No. 14155, everything contained in the abstract of record filed by the plaintiff in error in this case No. 14534, the assignments of error of the plaintiff in error in this case No. 14534, and the assignments of cross error

of the defendants in error in this case No. 14534. Herein the folio numbers referring to the transcript of record in case No. 14534 are preceded by the letter A. This Court has heretofore entered an order in cause No. 14584 that the record in case No. 14155 shall be taken and considered as part of the record in case No. 14534. Pursuant to such order and for the purpose of presenting in one volume the entire record, this supplemental abstract of record is presented.

* * * * *

This action is one by the plaintiff in error, plaintiff below, individually and as the administratrix with the will annexed, of the estate of Raymond D. Meyer, deceased, otherwise known and referred to as R. D. Meyer, and against William B. Milliken, Margaret M. Milliken, Texas Production Company, a corporation, and The Ohio Oil Company, a corporation, defendants in error and defendants below, to have decreed *void* and a *nullity* as to R. D. Meyer, the decree of the District Court of Carbon County, Wyoming, sitting at Rawlins in said state which decree was rendered on July 11, 1931, in which action said Meyer was a *joint defendant* with Trans. Oil Co. and wherein William B. Milliken, a defendant herein, was plaintiff, also for injunctive and other relief.

On October 29, 1935, plaintiff in error, and for convenience hereinafter referred to as plaintiff, instituted an action against the defendants in error, hereinafter for convenience referred to as defendants.

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Briefly the complaint alleges:

2 Par. *First:* The death of Raymond D. Meyer, or R. D. Meyer, on August 17, 1935, leaving a last will and testament and making plaintiff his sole beneficiary.

3 *Second:* That the will was admitted to probate and record by the County Court of the City and County of Denver on August 26, 1935, and that plaintiff was appointed as administratrix with the will annexed and duly qualified on the same day and that by the order of said Court on October 15, 1935, plaintiff was authorized to institute and maintain this action.

4-20 *Third:* Here is set out the agreement of August 31, 1922, entered into by R. D. Meyer with Trans. Oil Co. for a 1/16th net profit derived from oil and gas operation and development conduct upon the properties, permits or leases procured by said Meyer and by him assigned to Trans. Oil Co. and is Exhibit "R".

17 The last paragraph of said agreement, Fol. 17, reads as follows:

> "The rights and obligations of both parties hereto shall extend to their heirs and assigns."

Attached to said agreement and made a part thereof is a schedule of the lands covered by said agreement.

21-23 *Fourth*: On October 10, 1923, said Meyer in writing assigned to the Hamilton National Bank of Denver all profits and moneys due or to become due by virtue of said agreement with

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Trans. Oil Co. which assignment was acknowledged by said Trans. Oil Co. and by which it agreed to be governed.

That said Bank consolidated with the Denver National Bank on January 19, 1924, and the payments so to be made to said Meyer by said Trans. Oil Co. were thereafter to and including the year 1930, made to Denver National Bank.

Fifth: It is alleged that Texas Production Company is a Colorado corporation authorized to do and doing business in Colorado since about August 8, 1922.

Sixth: It is alleged that The Ohio Oil Company is an Ohio corporation at all the times herein mentioned authorized to do and doing business in Colorado.

Seventh: As amended, pursuant to the order of Court, it is alleged that Trans. Oil Co., about May or June, 1923, sold, assigned and conveyed to Texas Production Company an undivided one-half interest in and to the property described in the contract between said Meyer and Trans. Oil Co. but in particular the property therein described upon which the Hamilton Dome or structure in Moffat County, Colorado, is situate and the oil producing portion of which is known and described as "Moffat Pool," and it is the production therefrom which is the basis of this controversy but in particular as to the 1/16th net profits interest of said Meyer.

That the assignment and conveyance by

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Trans. Oil Co. to Texas Production Company, Par. "Fourth" thereof, stipulates,

27-29 "That it is acknowledged and understood that all interest and estates in, of or concerning any parts or portions of the property hereinabove described and mentioned as hereby sold, assigned and conveyed or hereunder to be sold, assigned and conveyed by first party to second party or by second party to first party, shall be taken and held in the hands of such assignee and as such assignee's interest may appear expressly subject to the full force and effect of that certain agreement dated August 31, 1922, entered into by and between first party and R. D. Meyer of Denver, Colorado, copy of which agreement is hereto attached, marked Exhibit 'A' and made a part hereof." (See Exhibit "R" this record.)

"To avoid duplication see Exhibit 'A,' Par. 'Third' hereof and by reference made a part hereof."

29-30 By that same writing, Texas Production Company stipulates with Trans. Oil Co. to drill and develop certain of the lands described in the agreement of August 31, 1922, between said Meyer and Trans. Oil Co. and it did thereafter drill and develop certain of said lands and produced large quantities of oil therefrom in the year 1924 and at all times since to the date of this action from the Hamilton Dome or Structure commonly known as the "Moffat Pool" and from which production there was a

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large net profit interest as defined in said agreement between said Meyer and the Trans. Oil Co.

31-33 That from April 1, 1931, and after The Ohio Oil Company acquired the remaining interest of Trans. Oil Co. in and to the agreement between said Meyer and Trans. Oil Co. of August 31, 1922, *Texas Production Company reported production to The Ohio Oil Company* which two companies from on or about April 1, 1931, became and to the date of this action, continued to be the sole and joint owners of the interest of said Trans. Oil Co. in and to said agreement of August 31, 1922, and in the reports by Texas Production Company to The Ohio Oil Company were set forth the respective amounts of money to which said Meyer was entitled and like reports have been made to plaintiff since his decease and all of said reports have shown the *retention* of 1/4 of the money to which said Meyer and his estate is entitled since the date of April 1, 1931, *and all payments made to the deceased and to the plaintiff since April 1, 1931, have been by the checks of the defendant, The Ohio Oil Company, based upon the reports to it by the Texas Production Company and made on behalf of both of said companies.*

34-35 *Eighth:* That the defendant, William B. Milliken, at or about July 26, 1927, *who at said date and at all times since resided and resides in the City and County of Denver,* instituted an action at Rawlins in the District Court of Carbon County, State of Wyo-

FOLIO

ming, against said Trans. Oil Co. and said R. D. Meyer as joint defendants, and his petition in said action, Fols. 36-154, inclusive, and with his Exhibit "A" attached as a part of it, continues to Fol. 184, and being at pages 13-63 of the record proper herein, among other things reads as follows:

95-97 "That said defendant Meyer, in taking out certain permits in the name of the plaintiff covering unfavorably located lands within the Hamilton and Isles structures, showed plaintiff's address as being at 1114 Logan St., Denver, Colorado, when in truth and in fact, said address was the residence of the said Meyer, and was not the address of said plaintiff, and this was well known to the said defendant, Meyer; all mail, therefore, addressed to the plaintiff by the United States Land Office touching said Hamilton and Isles structures, or any of the lands contained therein went to the defendant Meyers, and was never received by the plaintiff, and plaintiff, for many months after the transactions above set forth, understood and believed that filings had been made and permits issued in keeping with the understanding had between himself, the defendant Meyer and the said Hagen."

35-185 The petition in said action alleges a *Joint Adventure Agreement charging throughout conspiracy and fraud on the part of the defendants Trans. Oil Co. and Meyer, for the purpose of defrauding him of his rights*, alleges that

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the contract which he entered into on May 3, 1924, with the defendant, Trans. Oil Co. for a 1/32d of production from the Hamilton Dome and which by his action he seeks to have cancelled, *was entered into by him by reason of fraud practiced upon him*, which contract is attached to his petition and marked Exhibit "A" beginning at Fol. 155 of this record.

He also seeks an accounting from the defendant, Trans Oil Co. for 17½ per cent of profit derived from lands on Hamilton Dome and an accounting by it as to lands situated in the La Barge field in Wyoming; that the defendant, Meyer, be required to account to him for any profit by reason of the alleged Joint Adventure Agreement *and particularly as to the 1/16th of net production from Hamilton Structure under his said, Meyer's, contract with Trans. Oil Co.*

185-186. *Ninth:* It is alleged said Meyer was not a resident of Wyoming on March 26th, 1928, nor at any time thereafter to the date of his decease on August 17, 1935, nor at any time prior to March 26, 1928, and subsequent to the month of June, 1920, and that at no time following the month of June, 1920, did he live in the State of Wyoming, and that he did not remain out of the State of Wyoming nor conceal himself to avoid service upon him of the summons issued out of the District Court of Carbon County, Wyoming, *but that at or about the month of June, 1920, he moved with family from the State of Wyoming with the intention of becoming and being a resident of*

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Colorado, and that to the date of his decease he resided with his family in the City and County of Denver in Colorado and during practically the entire period so resided at 1114 Logan Street, Apartment 7, in said City and County.

187 *Tenth:* That on or about March 22, 1928, the defendant, William B. Milliken, as plaintiff in said action, filed with the Clerk of the District Court of Carbon County, Wyoming, "Precipe for Summons" as is set out at Fols. 188-189.

189 *Eleventh:* That on the same date, said Clerk issued and delivered to George C. Austin, the then Sheriff of Carbon County, Wyoming, "Alias Summons" which as to the purported copy thereof which was served upon the defendant, Meyer, is set out in full in Par. "Thirteenth" hereof, Fols. 207-212.

190-195 *Twelfth:* That on or about March 28, 1928, the defendant, William B. Milliken, a defendant herein, and plaintiff in said action, by C. R. Ellery, one of his attorneys, filed in said Court with the Clerk thereof an "Affidavit for Constructive Service" alleging that said Meyer was a resident of Wyoming, living a part of the time in Denver, Colorado, and part of the time at Fort Steele, Carbon County, Wyoming, although defendant, as aforesaid, is now and for many years has been a resident of said Fort Steele, Carbon County, Wyoming;

193 "That since the filing of this action said defendant has remained out of the State of Wyoming, and has concealed him-

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self, and now conceals himself to avoid the service of the summons issued out of the above named court in this cause, and since the filing of this suit, said defendant has and he does now so conceal himself that such process cannot be served upon him.

"That this action is brought for an accounting between co-joint-adventurers and to *cancel* and set aside a contract entered into between the plaintiff and the defendant, Transcontinental Oil Company, arising out of a joint adventure enterprise, and which said contract plaintiff was induced to enter into through the fraud of the defendants, Transcontinental Oil Company and R. D. Meyer, as co-joint-adventurers;

"That this action is one of those mentioned in Section 5636, Wyoming Compiled Statutes, 1920;

"That the present post office address of said defendant, R. D. Meyer, is Denver, Colorado.

C. R. Ellery

"Subscribed and sworn to before me this 26th day of March, 1928.

M. Cryderman,
Notary Public.

(SEAL)"

195- Said Section 5636, Service By Publication, beginning at Fol. 195 and top of Page 67, concludes near the top of Page 70, Fol. 204,

Sec. 5636. SERVICE BY PUBLICATION.

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Service by publication may be had in either of the following cases:

1. In actions under the first three sections of the last preceding chapter, when the defendant resides out of the state, or his residence cannot be ascertained.

196 (Which three sections under the subject, "WHERE ACTIONS TO BE BROUGHT," are the following:

Sec. 5609. BROUGHT WHERE PROPERTY IS SITUATED—WHEN. Actions for the following causes must be brought in the county in which the subject of the action is situate, except as provided in the next two sections:

1. For the recovery of real property, or of an estate or interest therein.

197 2. For the partition of real property.

3. For the sale of real property under a mortgage, lien or other incumbrance or charge.

Sec. 5610. WHEN PROPERTY IS SITUATED IN SEVERAL COUNTIES. When the property is situated in more than one county, the action may be brought in either; but in actions to recover real property this can only be done when the property is an entire tract.

198 Sec. 5611. SPECIFIC PERFORMANCE. An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants, or any of them, reside.)

FOLIO

2. In actions to establish or set aside a will where the defendant resides out of the state, or his residence cannot be ascertained.

3. In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defend-
199 ant's place of residence is unknown, and in actions against a corporation incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by Sec. 5631 and which has no place of doing business in this state.

4. In actions which relate to, or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly
200 or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence cannot be ascertained.

5. In actions against executors, administrators or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a
201 non-resident of the state, or his place or residence cannot be ascertained.

6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the

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service of a summons, or keeps himself concealed with like intent.

7. When a defendant in a petition in error has no attorney of record in this state, and is a non-resident of, and absent from the
202 same, or has left the same to avoid the service of a summons in error, or so conceals himself that such process cannot be served upon him.

8. In actions or proceedings under chapter 371, Wyoming Compiled Statutes, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when a defendant is a non-resident of the state.

9. In suits for divorce, for alimony, to
203 affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a non-resident of the state or conceals himself or herself in order to avoid service of process.

10. In all actions or proceedings which involve or relate to the waters, or right to appropriate the waters of the natural streams, springs, lakes or other collections of still water within the boundaries of the state, or which
204 involve or relate to the priority of appropriations of such waters, including appeals from the determination of the state board of control, and in all actions or proceedings which involve or relate to the ownership of irrigating ditches situated wholly or partly within this state, when the defendant, or any of the defendants are non-residents of the state.

In the complaint we allege, Fol. 204 that:

204- "Section 5636. Wyoming Compiled

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205 Statutes, 1920, pursuant to which the defendant, William B. Milliken, assumed to proceed to the securing of Constructive Service of process upon the named defendant, R. D. Meyer, reads and is the following, as to the applicable portion thereof which is paragraph 6:

"'In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent.'"

206 At Fol. 206, we have pleaded Section 5641 of Wyoming Compiled Statutes of 1920, reading as follows:

"Personal service out of state. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants

207 named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

207- *Thirteenth:* It is alleged:

211 "That on or about the 30th day of

207 March, A. D., 1928, a copy of what pur-

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ported to be the original Summons so issued by said Clerk on March 22, 1928, pursuant to said Precipe so filed on said date, was served in the City and County of Denver, in the State of Colorado, upon said R. D. Meyer, one of the named defendants in said action, together with a copy of the petition filed by the defendant, William B. Milliken, as plaintiff in that action, which copy of petition was filed by him with the Clerk of said Court on the 26th day of July, A. D. 1927, and

208 said copy of Summons is in words and figures the following, to-wit:"

The Summons being set out in full, and among other things saying: "Civil Action for Accounting between Co-joint Adventurers." (It will be observed that the endorsement required by Wyoming Statutes, Section 5627, hereinafter referred to relative to the endorsement that shall be placed upon a summons when sent elsewhere for service is *not* signed by the Sheriff.)

The copy of petition so served upon said Meyer appears in full in Par. "Eighth" of the complaint.

212 And Section 5627, Fol. 212, just referred to relative to endorsing a summons provides:

"The authority of such person so appointed shall be endorsed on such writ, order, process or notice by such officer, and directed to the person so appointed, by mail, at the risk of the party making such request."

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213 *Fourteenth:* The Wyoming Compiled Statutes of 1920, Chapter 370, Section 5930, is the following:

"INJUNCTION TO SUSPEND ENFORCEMENT OF JUDGMENT: The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or a part thereof, which injunction may be granted by the Court or any judge thereof when it is rendered probable by affidavit or by exhibition or the record that the party is entitled to have such judgment or order vacated or modified."

213-214 At the same Fol., Sec. 6167 of Wyoming Compiled Statutes, 1920, under Chapter 377, and the heading "Injunction Defined" says:

"The injunction provided by this chapter is a command to refrain from a particular act; it may be the final judgment in an action or may be allowed as a provisional remedy; and when so allowed it shall be by order."

214 *Fifteenth:*

"That said R. D. Meyer at no time made or entered any appearance in said action or in said Court either general or special, neither in person nor by attorney."

215-280 *Sixteenth:* Pages 73-95 of the Record proper is the *answer of the defendant, Trans. Oil Co.,* filed in said action in Wyoming, putting in issue all matters in the petition including the allegations charging conspiracy and fraud on the part of the said defendant or on

FOLIO

the part of any one alleged to have represented said defendant, and beginning at Fol. 243, says:

243 "This defendant further alleges that the making of the contract of May 3, 1924, attached to the plaintiff's petition," (which is plaintiff's Exhibit "A" and being the contract between said Milliken and Trans. Oil Co. providing for the receipt by Milliken of a 1/32d of the net production from the Hamilton Structure and being the contract which Milliken, in his petition was seeking to have cancelled) "was the result of full consideration and discussion occupying quite a number of days at Denver, Colorado, between the plaintiff and agents of this defendant whose authority was limited to negotiating with complainant, and following an assertion and claim of the plaintiff that he was entitled together with his son to a two-thirds (2/3) interest in the one-sixteenth interest of profits which had been nearly two years before granted to R. D. Meyer. That this defendant then insisted that one one-sixteenth interest granted to R. D. Meyer was full satisfaction of all the claims and demands which might have been made or had been made either by the said R. D. Meyer or this plaintiff herein, or both of them, together and this question and dispute was fully gone into on and prior to May 3, 1924, by both the plaintiff and this defendant. That on said date and

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concurrent with the execution of the contract of May 3, 1924, a copy of which is attached to the petition, the plaintiff and this defendant entered into another agreement hereinafter set out bearing the same
245 date whereby the said plaintiff together with Carl S. Milliken, a son of the said plaintiff, for value received, conveyed and transferred and assigned all of the right, claims and demands and interest of the said plaintiff and his said son, Carl S. Milliken, held or claimed by them, or either of them, as against the said R. D. Meyer, or as against the said one-sixteenth interest of the said R. D. Meyer under his contract of August 31, 1922, to this
246 defendant and that the said plaintiff from the time of the execution and delivery of said two contracts of May 3, 1924, had no claim, right, title or interest of any kind or nature as against the interest conveyed by this defendant to the said R. D. Meyer, or as against the said R. D. Meyer personally by reason of any of the matters arising out of any presentation of the said oil lands as lands possible for development or otherwise in connection with any oil lands whatever, wherever situate, and that these two contracts were executed at the same time between the plaintiff and this defendant after the fullest mutual discussion and consideration, the plaintiff being represented in respect to all of the discussions in preparing, executing and de-

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247 livering both of said contracts by eminent counsel, Clay Tallman and W. H. Taylor, learned in the law and of special experience in oil land matters, and were thereupon executed and mutually delivered in good faith, on the part of this defendant and with complete and absolute knowledge on the part of the said plaintiff of all the proceedings, circumstances, dealings or contracts held by this defendant with either the said R. D. Meyer or the said plaintiff or both of them.

248 "Defendant denies that any of the persons named in paragraph II of plaintiff's petition as the individuals with whom the plaintiff claims to have talked in reference to oil lands in Colorado ever at any time had any authority whatever to bind this defendant with respect to matters of compensation in any form whatever and denies that any of them ever did so attempt to bind this defendant, and this de-

249 fendant alleges that neither Ray V. Hennan or A. M. Hagan ever had any authority to employ in any manner or upon any consideration the said plaintiff, or in any way or manner whatever in or about the investigation and study of said lands as oil lands and that if the said Hennan or the said Hagan at any time talked with the said plaintiff, it was not in any manner because of any prior agreement of any kind or nature with respect either to compensation of the said plaintiff or of

FOLIO

any joint adventure agreement at any time entered into between the said plaintiff and this defendant or between the said plaintiff and this defendant and the said R. D. Meyer; this defendant again expressly alleging that there never was any joint adventure agreement.

250 "This defendant further alleges that the lands which were filed upon and for which permits were obtained to prospect for such development as would justify the issuance of an oil and gas lease from the United States and especially the filings made by the said A. M. Hagan and R. D. Meyer on the Hamilton structures were each and all included in the contract for development made with the Texas Production Company and in all respects were included in the payment of profits paid to the said plaintiff from time to time as hereinafter stated, and were well known by him to have been so included at the time of the execution by him of the contract now sought to be rescinded.

251

"This defendant further alleges that this defendant has in all things fully complied with both of said contracts with plaintiff and beginning on December 21, 1925, and long before there were any net profits arising from the oil operations in Colorado, made cash advances at the request of plaintiff either to him, or upon his order, in the sum of $3,500.00 on the dates following, to-wit; December 21, 1925,

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$1000.00; February 11, 1926; $1000.00; March 5, 1926, $1500.00; and that beginning with a payment on April 30, 1926, this defendant continued making payments from time to time either to the plaintiff or to his assignors, or upon garnishment proceedings against the said plaintiff of further sums which made up with the advances of $3,500.00, a total payment to the said plaintiff, or his assignors, or upon garnishment, the sum of $31,040.84, and defendant alleges that by the receipt and acceptance of the said payments, by the plaintiff and his assigns, without any objections, the plaintiff ratified and con-
253 firmed the contracts of May 3, 1924, and each of them, and is estopped both by the fact of such payments and by the long delay and laches in asserting any other or further rights, and by not offering to restore payments already received and to restore the parties to their original status, from now maintaining any action to set aside the contract of May 3, 1924, as attached to his petition herein or from seeking any rescission or cancellation of
254 the said contract of May 3, 1924.

"And this defendant further answering and with special reference to the averments of paragraph XV of the said petition and denying each of the averments thereof as stated therein, and for the purpose of showing in this action just what happened and was done with respect to

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and prior to and connected with the agreement and contract of May 3, 1924, this defendant respectfully shows that a letter of which the following is a true copy was
255 on August 28, 1922, addressed and delivered to R. D. Meyer by Arthur M. Hagan, William B. Milliken and Carl S. Milliken, and was on the same day, or within a day or two thereafter, delivered to this defendant by the said R. D. Meyer; said letter being as follows:

"'Denver, Colorado,
August 28th, 1922.

R. D. Meyer,
City.

We, the undersigned who are applicants for oil and gas prospecting permits for certain lands in Routt, Moffat and Rio Blanco counties, Colorado, as stated in the applications filed in the Glenwood
256 Springs, Colorado, Land Office on August 25th and 26th, 1922, and in consideration of time and money heretofore expended by you in furtherance of said applications for value received, hereby authorize and empower you to enter into any contract that you may see fit for the development of all the acreage described or allowed by the Government in the permits that may
257 be granted to us under aforementioned applications.

"We also agree that you are to receive the full compensation arising under said contracts and that we are to look to you

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only for our proper division of said compensation as may be agreed on later between us.

"We also agree to sign and execute any and all papers that may be required to fully protect you in any contract that you execute and upon request we will assign our permits referred to above in any manner that you may direct in accordance with any contract that you may enter into.

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"The above provisions to be binding on our heirs and assigns.

Yours truly,

(Signed) Arthur M. Hagan
(Signed) William B. Milliken
(Signed) Carl S. Milliken'

"That this defendant received and accepted and acted upon the said letter as, and defendant alleges that in every respect it was the voluntary action of the signers thereof and especially of the said William B. Milliken, and was signed and delivered by him with the knowledge that it was about to be delivered to this defendant, and that this defendant would act thereon in reliance thereof, and that this defendant in all that it did in the said matter and in the making of the contract with R. D. Meyer of August 31, 1922, acted in absolutely good faith with all of the parties and not otherwise. That this defendant thereupon on August 31, 1922, entered into a contract with the said R. D. Meyer in the words and figures following to-wit:

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260 * * * * "See Agreement, Paragraph 'Third' hereof. (Plff's Exhibit "R" this record.)

"That there was never any complaint nor objection made by the plaintiff with respect to the contract of August 31, 1922, between this defendant and the said R. D. Meyer until on or about the 27th day of March, 1924, when the said plaintiff and his son, Carl S. Milliken addressed a letter to R. D. Meyer, a copy of which was at or about the same time furnished to this defendant, which said letter is in words and figures, following:

"Denver, Colorado,
March 27, 1924.

261 Mr. R. D. Meyer,
1114 Logan Street,
Denver, Colorado.

My Dear Sir:

You will herewith take notice that the undersigned, W. B. Milliken and Carl S. Milliken, hereby recall and revoke any and all authority purporting to have been given you by letter under date of on or about August 28th, 1922, signed by us and Arthur M. Hagan, or otherwise, to negotiate a contract or contracts for the development of lands situate in Routt, Moffat and Rio Blanco Counties, Colorado, and embraced in oil and gas prospecting per-

262 mits of the said undersigned; and you are herewith advised that hereafter we will deal on and with respect to our permit and other lands, situated in said counties,

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independently without regard to anything contained in said letter.

This action is taken for the reason that you have entirely failed to comply with the conditions of said letter and collateral
263 agreements on your part to be performed, and also for the reason that we are convinced that our signatures to said letter were procured by fraudulent misrepresentation of matters of fact.

Very truly yours,

(Signed) W. B. Milliken
Carl S. Milliken

CT:MB"

"That the receipt of the copy of said letter of March 27, 1924, was the first intimation that this defendant received of any difference or disagreement or business dispute between the said plaintiff and the
264 said R. D. Meyer, and that between that date and May 3, 1924, there were various conversations between representatives of this defendant with the said R. D. Meyer and with the plaintiff herein and the said R. D. Meyer as to any compensation to come from the said R. D. Meyer to the plaintiff; the said plaintiff and his son claiming, in substance, that they were entitled to a two-thirds interest in the one-sixteenth interest which had been contracted to be paid to the said R. D. Meyer, and that the same should be assigned over to the said plaintiff and his son; that this defendant thereupon desiring to avoid

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being drawn into litigation between the said plaintiff and the said R. D. Meyer and being willing to buy peace for itself with respect to the carrying on to a
265 successful result the oil development of the lands and permits which had been assigned to it in the State of Colorado through the services of the said R. D. Meyer agreed after considerable negotiations and discussion between the plaintiff and his attorneys and the representatives and attorneys of this defendant, proceeded to make and did make and enter into the contracts of May 3, 1924, a copy of one of which is attached to plaintiff's petition
266 and the other contract is in words and figures following, to-wit:

"'AGREEMENT

"'THIS AGREEMENT made and entered into this 3rd day of May, 1924, by and between WILLIAM B. MILLIKEN and CARL S. MILLIKEN, both of Denver, Colorado, parties of the first part, and TRANSCONTINENTAL OIL COMPANY OF COLORADO, a Delaware corporation, party of the second part,

"'WITNESSETH: That,

267 "'WHEREAS, the said first parties assert and maintain that they are entitled to, and the owners of, an undivided two-thirds (2/3) interest in a certain one-sixteenth (1/16) of the net profits which may be derived from oil and gas operations and development which may be conducted upon

FOLIO

the properties, permits, or leases, procured by R. D. Meyer and assigned to the Transcontinental Oil Company, a Delaware corporation, under a contract dated the 31st day of August, 1922, between said R. D. Meyer and said Transcontinental Oil Company, and which was to be paid over to the said R. D. Meyer by said Transcontinental Oil Company in accordance with the terms of said contract, and which contract is hereby referred to, and

" 'WHEREAS, it is desired hereby to
268 convey, transfer and assign all of the right, claim, demand and interest of the said first parties as against the said R. D. Meyer, or as against the said one-sixteenth (1/16) interest of the said net profits, to the second party herein. Transcontinental Oil Company of Colorado.

" 'NOW, THEREFORE, for and in consideration of the sum of Ten ($10.00) dollars and other good and valuable considerations passing from the said second party to the said first parties, and the re-
269 ceipt of which is hereby acknowledged, the said first parties and each of them jointly and severally, have sold, assigned and transferred, and do hereby sell, assign and transfer unto the said party of the second part, all and singular, their right, interest, claim and demand, of every kind or nature, as against the said R. D. Meyer in any wise pertaining to any and all lands in Moffat, Routt and Rio Blanco

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counties, Colorado, or the one-sixteenth
270 (1/16) interest in said net profits, and the rights of said R. D. Meyer therein; provided that the said Transcontinental Oil Company of Colorado shall not settle or compromise the claim or claims herein assigned, in any manner or to any extent, without procuring from the said R. D. Meyer a full release and discharge of any and all claims of the said R. D. Meyer against the said William B. Milliken, and/or the said Carl S. Milliken, arising out of the properties, interests and transactions herein referred to, which release and discharge shall be forthwith delivered to said William B. Milliken and Carl S. Milliken; provided, further, that if, prior to the securing and delivery of such release and discharge as aforesaid, the said R. D.
271 Meyer shall institute proceedings against the said William B. Milliken and/or Carl S. Milliken, on any claim arising out of the properties, interests and transactions herein referred to, then the said William B. Milliken and/or Carl S. Milliken shall have the right of interposing the claim herein assigned as a defense of counterclaim against any such claim of the said R. D. Meyer, and the said Transcontinental Oil Company of Colorado shall execute
272 any instrument necessary to enable the said William B. Milliken and/or Carl S. Milliken to enforce the claim or claims herein assigned as a defense or counter-

claim as aforesaid, and for the benefit of the parties intersted as their interests may appear.

"'IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

(Signed) William B. Milliken (Seal)

(Signed) Carl S. Milliken (Seal)

TRANSCONTINENTAL OIL COMPANY OF COLORADO

273 ATTEST:

(Signed) T. R. Cowell

By (Signed) O. D. Robinson

Vice President

STATE OF COLORADO)

CITY AND COUNTY OF DENVER) ss

Personally appeared before me Elizabeth McKinley (signed) Notary Public, in and for said county and state, WILLIAM S. MILLIKEN and CARL S. MILLIKEN, both personally known to me to be the persons described in, and who executed the above and within instrument, and who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned and described.

274 IN WITNESS WHEREOF, I have hereunto attached my hand and notarial seal, this 3rd day of May, A. D. 1924. My commission expires March 13, 1927.

(Signed) Elizabeth McKinley

Notary Public'"

280 At Fol. 280, having pleaded in full the

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answer of Trans. Oil Co. to which was attached a copy of the agreement of August 31, 1922, between Trans. Oil Co. and R. D. Meyer, we say that to avoid duplication, Paragraph "Third" hereof is by reference made a part hereof. (Is Exhibit "R" this record.)

282-287 *Seventeenth:* That thereafter and on the 17th day of April, 1930, the plaintiff, Milliken, in that action filed with the Clerk of said Court his reply as set out in the Folios as designated which at Fols. 284-285, Par. IV, reads as follows:

284 "Plaintiff admits the contract set forth in the defendant's answer on pages 18-21, both numbers inclusive, but alleges that said contract was executed at the same time and simultaneously with the contract, a copy of which is attached to plaintiff's petition" (which is his contract for 1/32d of production) "and plaintiff alleges that he signed said contract under the same circumstances that he signed the contract, a copy of which is attached to his petition as 'Exhibit A', which said circumstances are set forth in paragraph XIV of his petition, and plaintiff further alleges that he was induced to execute said contract through the same false and fraudulent representations that induced him to execute the said contract, a copy of which is attached to his petition as 'Exhibit A', which said representations are set forth in paragraph XIV of his petition," and

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Fols. 97 and 98, said "Par. XIV," reads as follows:

"That on or about the 21st day of June, 1923, the defendant, Transcontinental Oil Company, entered into an operating contract with The Texas Production Company, under which contract the Texas Company was to drill a test well upon the Hamilton structure; that thereafter said Texas Production Company proceeded in the drilling of said well, and in the spring of 1924, said well came in with large production of a fine quality of oil; that the bringing in of said well established that said Hamilton structure was an exceedingly valuable oil field or structure."

288-300 *Eighteenth:* The defendant, Trans. Oil Co., on August 16, 1930, amended its answer by leave of the Wyoming Court by alleging an assignment by the plaintiff, Milliken on September 17, 1926, to one, George W. Milliken, of his contract of May 3, 1924, with said defendant, Trans. Oil Co. for 1/32d of the profits from the Hamilton Structure which contract, by his petition, he was seeking to have cancelled.

301-309 *Nineteenth:* The plaintiff, Milliken, on September 11, 1930, filed his reply to the Amendment of the Answer of Trans. Oil Co. and admitted the execution and delivery of the assignment set forth in the amendment to the answer of Trans. Oil Co., and alleges that the assignment was for security only and money loaned or to be loaned to him by George W.

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Milliken and that he had repaid to George W. Milliken all money borrowed and the assignment had been cancelled, which replication is verified by said C. R. Ellery.

Twentieth, Fols. 311-327, of this record is the decree of the Wyoming Court by V. J. Tidball, Judge, showing that it is entered on the judgment docket "C" J, Recorded District Court Record No. 18, Pages 205-206-207, and is the following:

"STATE OF WYOMING)
) ss.
COUNTY OF CARBON)
W. B. MILLIKEN, Plaintiff,
vs.) No. 2148
311 TRANSCONTINENTAL OIL) DECREE
COMPANY a corporation,
and R. D. Meyer,
Defendants.

This cause having come on regularly for trial upon the 15th day of May, 1931, before the Court without a jury, the plaintiff appearing in person and by his counsel,
312 C. R. Ellery and John Dillon, and the defendant, the Transcontinental Oil Company, appearing by John R. Smith and R. C. Gwilliam, its attorneys, and the defendant R. D. Meyer not appearing either in person or by counsel, and the default of said defendant R. D. Meyer having been duly entered of record for failure to appear, plead or answer to the petition of the plaintiff filed in this cause, and the Court having heard the evidence offered

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on behalf of the said plaintiff, and on behalf of the defendant, the Transcontinental Oil Company, and heard the arguments of counsel, and being now fully advised in the premises. Doth find the issues between said plaintiff and the defendant, the Transcontinental Oil Company, in favor of said defendant corporation, and that such finding is supported by competent and material testimony free from legal objections.

"That without qualification of such general finding herein, the Court specially finds from the evidence:

"First: That there was no joint adventure agreement entered into on or about May 21, 1921 by and between the said defendant corporation, the Transcontinental Oil Company, and the said plaintiff, as alleged in plaintiff's petition.

"Second: That the written contracts set forth in the pleadings and proofs, by
314 and between the plaintiff and the Transcontinental Company (sometimes therein called the Transcontinental Company of Colorado), and bearing date of May 3rd, 1924, were entered into between said plaintiff and defendant corporation, and between said plaintiff and Carl S. Milliken on the one part and the said defendant corporation, in good faith on the part of said defendant corporation and on good consideration, and made, executed and delivered on the part of said plaintiff for

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good consideration and with full knowledge, and without any fraud, deception
315 or conspiracy on the part of said defendant corporation, and have been in good faith kept and performed by said The Transcontinental Oil Company, and that said plaintiff after the execution and delivery of said contracts, accepted, benefited by, and ratified the said contracts.

"Third: That said action as between said plaintiff and said defendant corporation should be dismissed out of this Court with prejudice.

"Fourth: That jurisdiction in this Court for action of this Court as to or under the default of the defendant R. D. Meyer, is exercised only as between the plaintiff and said defendant R. D. Meyer, *and without prejudice to the findings and judgment in favor of said defendant corporation.*

316 "Fifth: That as between the plaintiff, W. B. Milliken, and the defendant, R. D. Meyer, the court *finds generally in favor of said plaintiff and against said defendant.*

"That without qualification of such general finding herein the court finds specifically as follows:

"1st. That the plaintiff, W. B. Milliken, and the defendant, R. D. Meyer, were co-joint adventurers touching and concerning the transaction or enterprise of submitting the Hamilton oil and gas

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317 structure referred to in plaintiff's petition to the Transcontinental Oil Company, and as such co-joint adventurers in said enterprise *said plaintiff and said defendant, R. D. Meyer, under the terms and provisions of the joint adventure agreement between them covering and concerning said enterprise, were and are entitled to share equally in any money, profits, oil and/or gas rights and interests, or other real or personal property derived through or by said*

318 *joint adventure enterprise, and paid, transferred, conveyed or* delivered by the said Transcontinental Oil Company to said plaintiff and said defendant, R. D. Meyer, or either of them.

"2nd. That on or about August 31, 1922, the said Transcontinental Oil Company, and the defendant, R. D. Meyer, entered into a written contract wherein and whereby, among other things, the said Transcontinental Oil Company agreed to pay and deliver unto said defendant, R. D. Meyer, a 1/16th part of the net profits which said Transcontinental Oil Company might derive from oil and gas operations

319 and development conducted upon the lands situated upon said Hamilton Structure described and referred to in said contract.

"3rd. That on or about the 3rd day of May, 1924, the said Transcontinental Oil Company and the plaintiff, W. B. Milliken, entered into a written contract wherein and whereby, among other things,

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said Transcontinental Oil Company, assigned, transferred and set over to said
320 plaintiff a 1/32nd of the net profits which said Transcontinental Oil Company might derive from the production of oil and/or gas on lands situated on said Hamilton Structure and described in said contract; that the total share of the net profits which might be derived by said Transcontinental Oil Company from the production of oil and/or gas from the said lands situated on said Hamilton Structure which the said Transcontinental transferred, assigned and set over to said defendant, R. D. Meyer and the plaintiff W. B. Milliken was and is a 6/64ths part of such net profits and the said defendant, R. D. Meyer and the plaintiff W. B. Milliken
321 have been at all times since the transfer and assignment of said share of such net profits, and they are now entitled to share equally in said 6/64ths part of such net profits.

"4th. That at all times since the transfer and assignment by said Transcontinental Oil Company of said 6/64ths part of said net profits to said defendant, R. D. Meyer, and the plaintiff W. B. Milliken as aforesaid the said defendant, R. D. Meyer has received from the Transcontinental Oil Company 4/64ths of said net profits and said R. D. Meyer has at all times failed, refused and neglected to account to the plaintiff W. B. Milliken for

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his 1/64th part there of, or to pay the
322 same over to him.

"5th. That the said 1/64th part of said net profits paid over by the Transcontinental Oil Company to the defendant, R. D. Meyer, to which said share the said plaintiff, W. B. Milliken, was entitled as against said defendant, R. D. Meyer, amounts at the date hereof to the sum of Twenty Three thousand, five hundred forty-eight and 54/100ths Dollars $23,548.54, together with interest thereon at
323 the rate of seven per cent per annum amounting to the sum of Six thousand eight hundred Forty-four and 34/100ths Dollars, $6,844.34, making a total of Thirty Thousand three hundred ninety two and 68/100ths Dollars, $30,392.88.

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That as between said plaintiff and the defendant, the Transcontinental Oil Company, this cause be and it is hereby dismissed, with prejudice, as to the defendant, the Transcontinental Oil Company, and that said defendant corporation have judgment against said plaintiff for
324 its costs, to be taxed.

"AND IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED as between the plaintiff, W. B. Milliken and the defendant, R. D. Meyer:

"1st. That said plaintiff have judgment against said defendant, R. D. Meyer

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in the sum of Thirty thousand three hundred Ninety-two and 88/100ths Dollars $30,392.88, with interest thereon at the rate of seven per cent per annum from and after the date hereof.

"2nd. That the said defendant, R. D. Meyer is hereby enjoined and restrained from hereafter taking or receiving from said Transcontinental Oil Company more than 3/64ths of the net profits acquired
325 or obtained by said Transcontinental Oil Company from the production of oil and/or gas from the lands situated on said Hamilton Structure, and described in the contract of August 31st, 1928, entered into between said Transcontinental Oil Company and said defendant, R. D. Meyer, and the contract of May 3, 1924, entered into between said Transcontinental Oil Company and said plaintiff, W. B. Milliken; and the defendant, Transcontinental Oil Company is hereby restrained and
326 enjoined from hereafter paying over, or in anywise transferring or delivering to said defendant, R. D. Meyer more than 3/64ths of said net profits.

"To that portion of the foregoing decree which is in favor of the defendant, Transcontinental Oil Company, the plaintiff, W. B. Milliken excepts, and exception allowed.

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"Dated this 11th day of July, 1931.
BY THE COURT:
(Signed) V. J. Tidball
Judge.

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O. K. as to form,
John Dillon
C. R. Ellery
Atty's for Plaintiff.
John R. Smith
R. G. Gwilliams
Atty's for Defendant
The Transcontinental Oil Company"

"Twenty-first: That prior to the signing by the Court of said Decree and the filing of same with the Clerk of said Court, the defendant, The Ohio Oil Company, to which on or about April 1, 1931, said Transcontinental Oil Company had sold, assigned, transferred and set over all of its remaining right, title and interest in and to the said Agreement of August

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31, 1922, between it, said Transcontinental Oil Company and said R. D. Meyer, and by which conveyance the defendant, The Ohio Oil Company, assumed and agreed to do and perform the duties and obligations which were by said Agreement of August 31, 1922, imposed upon said Transcontinental Oil Company to do and perform, did pursuant thereto and on or about May 11, 1931, make payment by its check to the order of said R. D. Meyer in connection with the operation of said "Moffat Pool" for the first quarter of the year

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1931, ending on March 31, thereof for
329 his stated one-sixteenth (1/16) of the net profit interest in the production from said "Moffat Pool", but that thereafter the defendant, The Ohio Oil Company, in reporting and remitting to said R. D. Meyer as to the quarterly net profit earnings from said "Moffat Pool" and in particular as said reports and remittances apply to and affect the one-sixteenth (1/16) net profits interest of said R. D. Meyer, withheld on each occasion, one fourth (¼) of his said interest being a one-sixty-fourth (1/64) of the stated net profits interest from production from said "Moffat Pool",
330 and was by the defendant, The Ohio Oil Company retained from each remittance to said R. D. Meyer, and the total amount so retained to the date hereof aggregates the sum of Four Thousand Eight Hundred Twenty-nine and 49/100 ($4,829.49) Dollars, aside from the amount owing to the estate of said R. D. Meyer for the third quarter of the year 1935 ending on September 30, 1935, which amount is not yet determined."

Twenty-second, Fol. 330, relate to correspondence pertaining to the withholding of the 1/64th of net profit from production from "Moffat Pool" following the Court's decre.

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Twenty-third, Fols. 331-334:

"THE OHIO OIL COMPANY

A. M. Gee,
General Counsel,
Hal W. Stewart,
G. E. McCullough,
R. H. Flitcher,
Attorneys

Findlay, Ohio
May 24, 1935

Mr. R. D. Meyer,
1114 Logan Street,
Denver, Colorado.

Dear Sir:

I have before me your letter of May 20, 1935, returning the statement for the first quarter of 1935 concerning operations on lease Denver 033221-a (our 383-a)
333 in the Moffat Pool in Colorado. The situation is being reviewed for the purpose of determining whether or not 1/64th net profits interest should be *continued to be held* or should be paid to Margaret Milliken as assignee of W. B. Milliken. In order that we may be in better position to determine the matter will you kindly furnish me documentary evidence upon which you base your claim to this 1/64th interest.

If, upon conclusion of the matter, it appears that the statements to you should properly show the amount involved in this 1/64th, statement will be sent to you. For your convenience in the meantime, I am returning herewith the statement for the

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334 first quarter of 1935 and if any additions are to be made to such statement because of such 1/64th interest, such additions will be made by a supplementary statement.

Very truly yours,

Hal W. Stewart

HWS:MP

Enc."

Twenty-fourth: That thereafter and on, to wit, June 3, 1935, said R. D. Meyer through his attorney W. E. Clark made answer to said letter of May 24, 1935, as follows:

335 "June 3, 1935.

Mr. Hal W. Stewart,
Legal Department,
The Ohio Oil Co.,
Findlay, Ohio.

In re: Operations on lease Denver 033211-a (your 383-a) in the Moffat Pool, Colorado.

My dear Sir:

I have before me your letter of May 24 addressed to Mr. R. D. Meyer of this
336 city, which letter he handed me and requested that I answer it.

The letter has particular reference to a 1/64th of the net Profits Interest in the operation of Moffat Pool, Colorado.

In this connection he has handed me the various statements mailed to him by your company since the decision of the District Court at Rawlins, Wyoming, enjoining Transcontinental Oil Company from paying to Mr. Meyer but 3/64ths of

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the 1/16th interest which he, under his contract with Transcontinental Oil Company was entitled to and had been for years receiving from it, and this letter is written in an endeavor to satisfy your company which is operating the property from which Mr. Meyer receives his interest that he is entitled to the 1/64th interest retained during the period since the rendition of said judgment and in the hope that he may soon be in receipt of a check for same accompanied by a supplementary statement covering it.

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I note you state in the first paragraph of your letter that "the situation is being reviewed for the purpose of determining whether or not 1/64th net profits interest should be continued to be held or should be paid to Margaret Milliken as assignee of W. B. Milliken. In order that we may be in a better position to determine this matter will you kindly furnish me documentary evidence upon which you base your claim to this 1/64th interest."

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Whether or not your department has copies of the various pleadings filed in the action in the District Court of Carbon County at Rawlins, Wyoming, I am, of course, not advised, but *am assuming* that you have as Mr. Gwilliam, who was at that time your attorney located at Casper, Wyoming, and who was associated with Mr. John R. Smith of this city, defended Transcontinental Oil Company in that

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action, did have copies of all pleadings as well as all contracts that were set out in the various pleadings, and did participate in the trial in defending Transcontinental Oil Company.

A brief review of what was done I deem proper at this time and will say that Mr. W. B. Milliken in February of 1927 instituted an action in the State District Court of *Lincoln County*, Wyoming, in which action he sued only Transcontinental Oil Company and alleged that under an agreement with it he was to have 35% interest in production and sought an accounting.

340 Transcontinental Oil Company being a corporation foreign to the State of Wyoming, though authorized to do business therein, and having been duly served with process, petitioned for the removal of the cause to the Federal District Court of Wyoming at Cheyenne and removal was ordered.

The plaintiff for reasons best known to himself dismissed that action "without prejudice" and subsequently and on or about the 25th day of July, A. D. 1927,

341 instituted an action in the *District Court of Carbon County*, Wyoming, at Rawlins, in which action *he joined R. D. Meyer as a defendant.*

In the action last referred to, which is much more elaborate and extensive as to the allegations in his petition, he assumed

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to join Mr. R. D. Meyer and alleged that he was interested in an arrangement whereby Transcontinental Oil Company was to pay a certain interest in production to both him and Meyer, and in that action
342 he sets out a contract which he had personally entered into with Transcontinental Oil Company which provided and provides that he is to have a 1/32nd portion of the net production, which contract he seeks in this second action to have cancelled and seeks an accounting as against Transcontinental Oil Company and Mr. Meyer after having charged them with conspiracy to defraud him and alleging the execution of an agreement with Mr. Meyer for a 1/16th of the net production.

Transcontinental Oil Company having been served with process in this second action petitioned for the removal of the cause to the Federal District Court of Wyoming at Cheyenne, and the cause was removed—that petition sets forth that the
343 plaintiff was at the time of the commencement of the action a citizen of the State of Colorado; that the defendant R. D. Meyer was at said time a citizen of the State of Wyoming; that the defendant Transcontinental Oil Company was a Delaware Corporation authorized to do business in Wyoming; that the amount involved exceeded, exclusive of interest and costs, the sum of $3,000.00; that the action was one of a civil nature for an accourt-

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ing of an alleged profit contract as set forth in the petition of plaintiff; reserved
344 all questions of venue, service, want of service and jurisdiction; tendered a bond in the penalty of $500.00, and that the controversy between the defendant Transcontinental Oil Company and plaintiff is a separable one and that the joinder of the defendant Meyer is fraudulent and made for the purpose of defeating any removal. A motion to remand was filed and the matter of the joinder of Meyer as a defendant for the purpose of defeating removal was
345 the point stressed in the argument, and the Court following the argument *remanded the case to the State Court*, and as we respectfully submit for the reason that at the time, although it affirmatively appeared at the hearing that the defendant Meyer was at that time and for some time prior thereto had been living in Denver *and had not been served with process*, it did not affirmatively appear that the joinder of Meyer was for the purpose of defeating removal to the Federal Court, and there was nothing before the Court upon which it could make a finding to that effect.

Thereafter and on the 26th day of March, 1928, C. R. Ellery, one of plaintiff's attorneys, made an affidavit in the action in the State Court where the cause had been instituted and to where it was
346 remanded, which is designated "AFFIDA-

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VIT FOR CONSTRUCTIVE SERVICE", and immediately following that is stated, "Filed March 28, 1928, Stella Jungquist, Clerk of the District Court", and the affidavit is the following:

"C. R. ELLERY, first being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled action, and as such attorney makes this affidavit for and on behalf of plaintiff; that service of summons cannot be made in
347 this state on the defendant, R. D. Meyer; that the defendant R. D. Meyer, is now and for many years has been a resident of Fort Steele, Carbon County, Wyoming; that until the filing of this action, said defendant lived part of the time in Denver, Colorado, and part of the time at said Fort Steele, Carbon County, Wyoming, although defendant, as aforesaid, is
348 now and for many years has been a resident of said Fort Steele, Carbon County, Wyoming; that since the filing of this action said defendant has remained out of the State of Wyoming, and has concealed himself, and now conceals himself to avoid the service of the summons issued out of the above named court in this cause, and since the filing of this suit, said defendant has and he does now

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conceal himself that such process cannot be served upon him.

"That this action is brought for an accounting between co-joint-adventurers and to cancel and set aside a contract entered into between the plaintiff and the defendant, Transcontinental Oil Company, arising out of a joint adventure enterprise, and which
349 said contract plaintiff was induced to enter into through the fraud of the defendants, Transcontinental Oil Company and R. D. Meyer, as co-joint adventurers;

"That this action is one of those mentioned in Section 5636, Wyoming Compiled Statutes, 1920;

"That the present post office address of said defendant, R. D. Meyer, is Denver, Colorado,

350 C. R. Ellery

"Subscribed and sworn to before me this 26th day of March, 1928.

M. Cryderman,
Notary Public.

"(SEAL)"

While the affidavit is very positive in its recitals that Mr. Meyer conceals himself to avoid the service of process, and states that he has been residing part of
351 the time in Denver and part of the time in Wyoming, that he is a resident of Wyoming, concludes by stating that he is in Denver, so that in and about the con-

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cealing of himself he was not a success, and which in itself discloses the absurdity of the statements previously set out in the Affidavit for Service.

Pursuant to that affidavit a summons was issued and sent to the sheriff at Denver and served upon Mr. R. D. Meyer *in* Denver.

No appearance was ever made or entered by or on behalf of Mr. R. D. Meyer either special or general and the cause was tried upon the answer of Transcontinental Oil Company, and at the conclusion of that trial the Court entered its decree, and while I am assuming, as suggested in the first instance, that you have before you copies of all the pleadings in the case, and am also asuming that you have before you a copy of the Court's decree, I am regardless of that assumption handing you a complete copy of the Court's decree, which I have before me, with the original signature of Judge V. J. Tidball attached.

353 That the foregoing is a judgment in *personam* and *not* in *rem*.

The ordinary decree where there is no appearance and service of process has been had, recites the *nature* of the service, but while in this decree there appears to have been the default of the defendant Meyer entered, there is no suggestion as to the *nature* of the service—there is no question as to the *character* of the judgment, that is, as to its being one in *per-*

FOLIO

sonam; and where the Court secured or acquired jurisdiction for the rendition of
354 the judgment has always been beyond my ability to ascertain.

The instrument speaks for itself and certainly tells a peculiar story.

After finding every issue favorable to Transcontinental Oil Company the Court then does the only thing it could do, to-wit, dismiss Transcontinental Oil Company out of Court with prejudice.

That judgment necessarily was and is a *final* disposition of the case insofar as Transcontinental Oil Company was and is concerned.

The Court then assumes to make findings as against the defendant Meyer and takes occasion to say in paragraph Fourth that they are "without prejudice to the findings and judgment in favor of
355 said defendant corporation," and then assumes to render its judgment against the defendant Meyer without having acquired any jurisdiction, and follows that up by assuming to have some sort of jurisdiction to enjoin Transcontinental Oil Company after having absolutely found all the issues in its favor, and having *dismissed* it out of the action *with prejudice.*

You have asked Mr. Meyer to kindly
356 furnish "documentary evidence" as a basis for his claim to the 1/64th interest which has been withheld, and which I am advised from the statements of your com-

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pany before me total in the aggregate more than $4400.00, and your request for "documentary evidence" having been made following the adjudication referred to, I am assuming refers to procedure and Court determination as the basis for it rather than executed papers between the parties or any record of such papers, as the original contract which was entered into between Transcontinental Oil Com-
357 pany and R. D. Meyer was before the Court, the contract subsequently entered into between Transcontinental Oil Company and W. B. Milliken whereby he was give a 1/32nd of net profits was before the Court, and Milliken asked its cancellation which was denied by the Court, and another instrument to which I respectfully call your attention and which was before the Court is set out in the answer of Transcontinental Oil Company, and according to the copy of the answer of said company which was furnished me by its attorney, Mr. John R. Smith, and begins in the last line at the bottom of page 18 and concludes at the bottom of page 20, which is an agreement entered into on the same day that the 1/32nd interest was contracted to be given by Transcontinental
358 Oil Company to the plaintiff Milliken and which you will observe assigns every interest which Milliken claims to have had against Meyer and his 1/16th contract, to Transcontinental Oil Company, and as-

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sumes further by its terms to reserve to the plaintiff Milliken a right to assert his claimed interest in the Meyer contract as a defense or counterclaim *only* in the event
359 he should be sued by the defendant Meyer.

One more reference I desire to make and that is to the agreement between the Transcontinental Oil Company and R. D. Meyer which according to my copy of the answer of the defendant Transcontinental Oil Company appears at pages 13, 14, 15 and 16 thereof, and which contract duly executed by Meyer and Transcontinental
360 Oil Company concludes as follows:

> "IN WITNESS WHEREOF, the parties hereto have signed this agreement the year and date first above written.
>
> (Signed) R. D. Meyer
>
> "Witness to signature of R. D. Meyer,
>
> A. M. Hagan
>
> W. B. Milliken."

Following the execution of the above agrement is the schedule following which it is said, "All of above described lands selected by A. M. Hagan and R. D. Meyer, Aug. 24, 1922."

You will observe that the schedule attached to the Meyer contract, which con-
361 tract bears date August 31, 1922, shows that the schedule was attached to and made a part of the contract which Milliken witnessed, and then follows the allega-

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tion of the answer of the defendant Transcontinental Oil Company which is the following, "That there was never any complaint nor objection made by the plaintiff with respect to the contract of August 31, 1922, between this defendant and the said R. D. Meyer until on or about the 27th day of March, 1924, when the said
362 plaintiff and his son, Carl S. Milliken addressed a letter to R. D. Meyer, a copy of which was at or about the same time furnished to this defndant," which letter is then set out in the answer.

While I have called your attention to certain of the matters set out in the answer of the defendant Transcontinental Oil Company, that has been done solely with the desire that I may have properly placed the picture before you and *not* as
363 the reason why Mr. Meyer asks for this retained 1/64th interest, as his basis for that is that the court was *without jurisdiction* to have rendered any judgment against him, *and having already dismissed the action with prejudice as to Transcontinental Oil Company certainly was without any jurisdiction or suggestion of authority to have assumed to have enjoined Transcontinental Oil Company from paying the 1/64th interest to Mr. Meyer.*

Just by way of comment I suggest that regardless of what else the decree may contain it nowhere suggests that the

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1/64th be paid to W. B. Milliken or to anyone for him or for his use, and therefore, his assumed assignment to his wife, Margaret, is an assumption to assign something that has not even been decreed to him.

364 In conclusion I respectfully request and ask that no part of that 1/64th interest retained be paid to W. B. Milliken or to any person on his order or for his use or benefit, but that the same be transmitted to R. D. Meyer, and trusting that I have satisfactorily conformed to your request, I am

Very truly yours,
W. E. Clark

WEC:GE Enc.

365 P. S. I, at all times referred to in the foregoing letter, represented Mr. Meyer as his attorney and advised him against entering any appearance in the case.

W. E. C."

And on June 4, 1935, caused a copy thereof to be mailed to Yates W. Land, attorney for the defendant, Texas Production Company, at its offices in the City and County of Denver, the receipt of which letter was duly acknowledged by said attorney on June 10, 1935.

366-367 *Twenty-fifth:* This paragraph sets forth in substance the letter of attorney, Stewart, of date September 28, 1935, which is Exhibit "Q" in the Bill of Exceptions.

368-369 *Twenty-sixth:* It is alleged that attorney, Stewart's letter of September 28, 1935, is the

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first advice plaintiff had that the $4,829.49 of deceased's money had been paid by the defendant, The Ohio Oil Company, to Margaret M. Milliken as the alleged assignee of the defendant, William B. Milliken, and that the payments so made were to plaintiff's damage in the sum of $4,829.49.

369-370 *Twenty-seventh:*

"That the judgment and decree of the District Court of Carbon County, Wyo-

369 ming, was and is as to said R. D. Meyer, deceased, as a defendant, in said action in said Carbon County, Wyoming, Court absolutely void as having been rendered by said Court without jurisdiction of the person of said deceased and without jurisdiction of his property, which by its decree it assumed to impound, and does not even

370 follow nor conform to, but contravenes the findings of the Court as set forth in said decree, and if said judgment be allowed to stand and be made effective as to said R. D. Meyer, it will cause plaintiff irreparable injury.

Twenty-eighth: "That due process of law did not and has not obtained in said action."

Twenty-ninth:

"That said judgment and decree of said Court is contrary to and in violation of the constitution of the State of Wyoming, and in particular of Section 6 of Article i thereof, wherein it says that 'no person shall be deprived of life, liberty or

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371 property without due process of law and is in violation of that portion of Article xiv, Section 1 of the Constitution of the United States which says: 'Nor shall any state deprive any person of life, liberty or property without due process of law', and contravenes and violates as well Article v of the Amendments to the Constitution of the United States, which reads substantially as do the two previous quotations

372 and, to wit: 'No person shall be deprived of life, liberty or property without due process of law.'"

Thirtieth: "That the applicable sections of the Compiled Statutes of the State of Wyoming, hereinbefore pleaded in paragraph "Twelfth" of this Complaint and upon which the plaintiff in said action assumed to rely in securing authority to have Constructive Service made upon the named defendant, R. D. Meyer, and in procuring such Constructive Service as was made, do not even purport to, do not and never did give to said Court jurisdiction to render a judgment in personam for the sum of Thirty Thousand Three Hundred Ninety-two and 88/100 ($30,392.88) Dollars, together with interest at seven (7%) per cent per annum so adjudged and decreed or for any sum whatsoever;

373 nor did the service so had upon the said deceased, nor the Statutes authorizing such service give or purport to give to said Court any jurisdiction over the de-

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ceased or the property of said deceased as is assumed by the injunctive provisions of said decree. And the applicable Statutes of the State of Wyoming do not even assume or purport to give jurisdiction such as was assumed to be and was exercised by said Court, and said deceased was deprived of his day in Court."

374 *Thirty-first:* "That plaintiff has no plain, speedy or adequate remedy at law."

374 WHEREFORE, the premises considered, this plaintiff prays the judgment of this Court that the judgment and decree of the District Court of Carbon County, Wyoming, be held and adjudged to be as to the named defendant, R. D. Meyer, therein, now deceased, a nullity and in its entirety void for want of jurisdiction of said Court as to either said R. D. Meyer or of his property, by said decree assumed to have been impounded, and that it

375 be vacated.

For judgment against the defendants, William B. Milliken and Margaret M. Milliken, and each of them for the sum of Four Thousand Three Hundred Thirty-Five and 49/100 ($4,335.49) Dollars, together with interest thereon at the rate of six (6%) per cent per annum, from March 16, 1935; for judgment against them and each of them for the sum of Two Hundred Fifty-One and 11/100 ($251.11) Dollars, together with interest at six (6%) per cent per annum from May 16, 1935; and for the further judgment against them and each of them for the sum of Two Hundred

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Forty-Two and 89/100 ($242.89) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from August 15, 1935.

For judgment against the defendants, Texas Production Company and the Ohio Oil
376 Company, and each of them for the following respective amounts hereinafter set out and from the following respective dates when said amounts were due and payable to said R. D. Meyer, deceased, as are hereinafter set out, with interest at eight (8%) per cent per annum, upon the respective amounts from the respective dates when they became due and payable to said deceased to March 7, 1935, and thereafter, at six (6%) per cent per annum, until judgment shall have been rendered here-
377 in, to wit:

$262.76 due September 10, 1931
188.91 due November 4, 1931
270.73 due February 6, 1932
359.14 due May 23, 1932
447.40 due August 24, 1932
420.69 due November 8, 1932
388.05 due February 16, 1933
220.57 due May 8, 1933
66.29 due August 8, 1933
331.21 due November 13, 1933
319.61 due February 7, 1934
308.08 due May 10, 1934
369.51 due August 14, 1934
215.54 due November 16, 1934
378 167.78 due February 18, 1935

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251.11 due May 16, 1935
242.89 due August 15, 1935

and being the respective principal sums so withheld from said deceased and totalling Four Thousand Eight Hundred Thirty and 27/100 ($4830.27) Dollars, which is an amount seventy-eight (78c) cents in excess of the total amount stated by the attorney for the defendant, The Ohio Oil Company, in his said letter of September 28, 1935, to have been paid to the defendant, Margaret M. Milliken.

That the defendants, William B. Milliken and Margaret M. Milliken, their agents and attorneys and any and all persons claiming by, through or under them be enjoined from in any manner or by any procedure attempting to enforce said judgment and decree or make collection of any part or portion of the money and other property of the deceased, and from alien-
379 ating or attempting to alienate any part or portion of their alleged interest in such judgment and decree.

From in any way interfering with the rights of the plaintiff herein as to any and all accrued or future accruing money representing the one-sixteenth (1/16) interest of said deceased in and to the net profits interest in the production from said "Moffat Pool" or from any other of the lands described in said Agreement of August 31, 1922, which are being or may be drilled and developed by the defend-
380 ants, the Ohio Company and/or Texas Production Company and/or their successors and/or assigns.

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For the further order and decree of this Court that the defendants Milliken make, execute and deliver any and all necessary releases that may be required to satisfy the judgment and decree of said District Court of Carbon County, Wyoming, and any and all property of the said deceased in the State of Wyoming which has been or may be detrimentally affected by the lien of said judgment or of any process that may have been issued based thereon. And in the event of their failure to
381 so act within such time as the Court may by its decree order and direct, that the Court appoint a commissioner with full authority to act in that behalf.

For her costs incurred herein, both taxed and to be taxed, and for such other and further relief in the premises as to the Court shall seem meet.

W. E. Clark,
Attorney for Plaintiff.

383 ANSWER AND CROSS-COMPLAINT OF DEFENDANT TEXAS PRODUCTION COMPANY

I.

384 Admits the allegations in Paragraphs "First," "Second," "Third," "Fourth," "Fifth," and "Sixth" of the complaint.

II.

384-390 Puts in issue the matters alleged in Paragraph "Seventh" of the complaint.

III.

389 Admits the allegations in Paragraph "Eighth" of the complaint.

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IV.

390-391 Puts Paragraph "Ninth" of the complaint in issue under the Code.

V.

391-392 Admits the allegations in Paragraphs "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," "Sixteenth," "Seventeenth," "Eighteenth," "Nineteenth," and "Twentieth" of the complaint.

VI.

392-394 As to the matters alleged in Paragraph "Twenty-first" of the complaint, it admits the assignment of April 1, 1931, by Trans. Oil Co., to the defendant, The Ohio Oil Company, of all its remaining right, title and interest in and to the agreement of August 31, 1922, between it and R. D. Meyer, and that The Ohio Oil Company, about May 11, 1931, made payment to Meyer as alleged and that to the date of the filing of the complaint herein, the money owing the estate of said Meyer for the third quarter of 1935 had not been paid and as to the other matters alleged in said Paragraph 'Twenty-first" and not admitted, puts them in issue under the Code.

VII.

394-395 As to the allegations in Paragraphs "Twenty-second" and "Twenty-third" of the complaint, it puts them in issue under the Code.

VIII.

395 Admits the allegations in Paragraph "Twenty-fourth" of the complaint.

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IX.

395-396 As to the allegations in Paragraphs "Twenty-fifth" and "Twenty-sixth" of the complaint, it puts them in issue under the Code.

X.

396 Denies each and every of the allegations of the complaint contained in Paragraphs "Twenty-seventh," "Twenty-eighth," "Twenty-ninth," "Thirtieth" and "Thirty-first."

SECOND AND FURTHER DEFENSE

396 It alleges that plaintiff's interest arises under and is founded upon a certain contract dated August 31, 1922, between plaintiff's predecessor in title and defendant, The Ohio Oil Company's predecessor in title, Trans. Oil Co., to which contract it was not a party, and alleges:

397 "That said contract constituted a personal obligation of the Transcontinental Oil Company to plaintiff's said predecessor in title (R. D. Meyer) and vested in said Meyer no interest in the lands, leases thereon, or oil produced therefrom; that in purchasing an interest in said property this defendant did not assume, agree to pay, or agree to otherwise discharge, said personal obligation, or any part thereof, but merely acquired such interest subject

398 to the right of said R. D. Meyer and his successors in interest to participate in the net profits from said property if, as and when there should be any such net profits; that no contractual relation now exists, or

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has ever existed, between this defendant on the one part and said R. D. Meyer or plaintiff on the other part with respect to said lands, the leases thereon, the oil produced therefrom, or the net profits therefrom; that from beginning this defendant
399 proceeded upon the assumption that the said Meyer was legally entitled to look only to the Transcontinental Oil Company and its successor in interest (the defendant The Ohio Oil Company) for payment of any net profits accruing to said Meyer one-sixteenth net profits interest, and that said Transcontinental Oil Company and its successor in interest (defendant The Ohio Oil Company) had a right to demand and receive payment for said interest from this defendant; that such view of the legal relations and rights, duties and obligations of the respective parties was at all times shared and entertained by Transcontinental Oil Company and defendant The Ohio Oil Company, and payments have at all times been made by this defendant to said Transcontinental Oil Company and defendant The Ohio Oil Company in accordance with the aforesaid understanding; that plaintiff's predecessor in title
400 (R. D. Meyer) apparently also had the same understanding of the legal relationship and the respective rights, duties and obligations of the parties to the aforesaid contract, and at all times knew that this defendant was accounting to said Trans-

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continental Oil Company and said The Ohio Oil Company, respectively, for the net profits interest claimed by said Meyer, and made no objection thereto or demand on this defendant that it account for said interest direct to said Meyer, but, on the other hand, said Meyer, with full knowl-
401 edge of the facts as aforesaid, acquiesced in such course of dealing, accepted payments regularly from Transcontinental Oil Company, and The Ohio Oil Company, and voiced no objection to the failure of this defendant to make said payments or any part thereof to him; that if said Meyer had objected to this defendant's accounting for the interest claimed by him to the Transcontinental Oil Company or The Ohio Oil Company and had he demanded that this defendant pay him direct for his claimed interest, this defendant would not have paid the Transcontinental Oil Company or the defendant The Ohio Oil Company for the interest claimed by said Meyer; that the foregoing state of facts constituted a representation of fact on the part of said Meyer, which representation of fact it was intended that this defendant should rely upon, and this defendant did rely thereupon and accordingly paid said Transcontinental Oil Com-
402 pany and said The Ohio Oil Company for the full interest claimed by the said Meyer, thereby changing its position to its prejudice; that to now permit plaintiff to main-

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tain an action to recover from this defendant any part of the amount sued for herein and which has previously been paid to
403 the Transcontinental Oil Company or to The Ohio Oil Company by this defendant, would work a great hardship on, and an injustice and irreparable injury to, this defendant; that the amounts sought to be recovered herein as net profits accruing to the said R. D. Meyer interest prior to January 2nd, 1932, were part of the amounts paid to the defendant The Ohio Oil Company by this defendant as aforesaid. Defendant, therefore, says that by reason of the facts hereinabove set forth plaintiff's predecessor in title (R. D. Meyer) and plaintiff herself are estopped at this
404 time to make any claim or demand against this defendant for amounts accruing to the aforesaid R. D. Meyer net profits interest and by this defendant paid to either Transcontinental Oil Company or defendant The Ohio Oil Company."

404 THIRD AND FURTHER DEFENSE AND CROSS-COMPLAINT AGAINST DEFENDANTS WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, AND THE OHIO OIL COMPANY.

405 Complaint against defendants, William B. Milliken, Margaret M. Milliken and The Ohio Oil Company.

I.

405 "This defendant hereby adopts, alleges

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and incorporates by reference all of the matters and things contained in Paragraphs FIRST, SECOND, THIRD, FIFTH, SIXTH, EIGHTH, TWELFTH, THIRTEENTH, FIFTEENTH, SIXTEENTH, SEVENTEENTH, EIGHTEENTH, NINETEENTH and TWENTIETH, of plaintiff's complaint herein, and all of the matters and things contained in paragraph II of this defendant's first defense as set forth in this answer, all of the matters and things contained in this defendant's SECOND AND FURTHER DEFENSE as set forth in this Answer and Cross-Complaint, and all of the matters and things contained in paragraphs III, IV, V, and VI, contained in the THIRD AND FURTHER DEFENSE AND CROSS-COMPLAINT of the Answer and Cross-Complaint of defendant The Ohio Oil Company on file herein."

406

II.

"That the payments made by this defendant as aforesaid on account of the said Meyer one-sixteenth net profits interest were made by this defendant to defendant The Ohio Oil Company upon the representation made to this defendant by said The Ohio Oil Company that it would pay the same to the party rightfully and legally entitled to receive payment thereof and upon the agreement of said The Ohio Oil Company made with this defendant that said The Ohio Oil Company would

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pay said sums to the party rightfully and legally entitled to receive payment therefor as aforesaid; that, if such payments were erroneously or improperly made; they were made under a mutual mistake of fact and law; nevertheless, had it not been for such representation and agreement by The Ohio Oil Company as aforesaid, this defendant would not have paid said sums to the defendant The Ohio Oil Company."

408

III.

"That this defendant has heretofore demanded of defendants William B. Milliken and Margaret M. Milliken that said sums of money so paid Margaret M. Milliken by defendant The Ohio Oil Company be repaid to this defendant, but neither of said defendants (William B. Milliken or Margaret M. Milliken) has repaid the said money to this defendant or any part thereof."

IV.

"That this defendant has heretofore demanded of the defendant The Ohio Oil Company that said sums of money so paid to it be repaid to this defendant, but said defendant The Ohio Oil Company has not repaid said money to this defendant or any part thereof.

409

"WHEREFORE, This defendant (Texas Production Company) prays that plaintiff's Complaint be dismissed as to it, and, in the event judgment is rendered

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herein for plaintiff against this defendant for any sum, that this defendant then have judgment over and against the defendants The Ohio Oil Company, William B. Milliken, and Margaret M. Milliken for a like sum, and that in either event it have and recover its costs and expenses herein expended and such other, further
410 and different relief as to the Court may seem meet and proper in the premises and to which it may be justly entitled under the facts.

Y. A. LAND,
Attorney for Defendant
Texas Production Company."

ANSWER AND CROSS-COMPLAINT
413 OF THE OHIO OIL COMPANY

414 "Admits the allegations contained in Paragraphs First, Second, Third, Fourth, Fifth, Sixth and Eighth."

II.

414 Denies that on or about the month of May or June, 1923, Trans. Oil Co. assigned or conveyed to Texas Production Company a one-half interest in the property described in the agreement of August 31, 1922, with said Meyer for an undivided one-half interest in said contract as alleged in Paragraph "Seventh" of plain-
415 tiff's complaint, but *admits* that Trans. Oil Co., assigned to Texas Production Company a one-half interest in that part of the property described in said agreement from which oil has been produced in the "Moffat Pool." Puts in

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416 issue the alleged period of oil production from said pool and that there was a net profits interest as alleged in the complaint.

417 Fol. 417 admits that from April 1, 1931, to January 2, 1932, after it acquired the remaining interest of Trans. Oil Co. in said agreement of August 31, 1922, The Texas Production Company and defendant, The Ohio Oil Company, became the *sole* owners, but denies that they became joint owners as alleged in the amendment to Paragraph "Seventh" of the complaint; denies that Texas Production Company had any interest in said lands or con-

418 tracts or lease subsequent to January 2, 1932, and denies the other allegations in the amendment to Paragraph "Seventh" set forth and not previously admitted, and denies that any payments made by it to Meyer or to plaintiff after January 2, 1932, were made 'for and on behalf of both of said defendant companies."

419 Admits the other allegations of said Paragraph "Seventh" and of the amendment to Paragraph "Seventh" not expressly denied, qualified, explained or avoided.

III.

419 Puts the allegations of Paragraph "Ninth" in issue under the Code.

IV.

420 Admits the allegations contained in Paragraphs "Tenth," "Eleventh," "Twelfth," as amended, "Thirteenth," "Fourteenth," "Fifteenth," "Sixteenth," "Seventeenth," "Eighteenth," "Nineteenth" and "Twentieth."

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V.

Admits that on April 1, 1931, Trans. Oil Co., had sold, assigned, transferred and set over to The Ohio Oil Company all its remaining right, title and interest in and to the agreement of August 31, 1922, between it and said Meyer and that it, on or about May 11, 1931, by its check, made payment to Meyer in connection with the operation of "Moffat Pool" for the first quarter of 1931, for 1/16th of the
421 net profits interest in production from said "Moffat Pool" and that thereafter, in reporting and remitting to said Meyer from said "Moffat Pool" it paid him but 3/64ths of the net profits from the production from said pool and until the 16th of March, 1935.

"This defendant retained in a special account 1/64th of the net profits from the
422 production from said 'Moffat Pool'; that upon said 16th day of March, 1935, this defendant, relying upon the decree of said District Court for the Second Judicial District of the State of Wyoming in and for the County of Carbon, set forth in Paragraph Twentieth of plaintiff's complaint, and upon demand of the defendants William B. Milliken and Margaret M. Milliken, paid over to said defendant Margaret M. Milliken the sum of Four Thousand Three Hundred Thirty-five and 49/100 Dollars ($4,335.49), and additional quarterly payments to a total of Four Thousand Eight Hundred Twenty-nine and
423 49/100 Dollars ($4,829.49); that in mak-

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ing said payment to said Margaret M. Milliken this defendant further relied upon the fact that no demand or request of any kind had ever been made by said R. D. Meyer for payment to him of any sum representing said 1/64th of the net profits from the date of the entry of said decree, dated the 11th day of July, 1931, to the date of said payment on March 16th, 1935, although as this defendant is informed and believes and so alleges said R. D. Meyer was at all times fully informed and aware of the entry of said decree of July 11, 1931, and the contents thereof.

"That during all of said time from the date of the decree of July 11, 1931, until March 16, 1935, this defendant was accounting to said R. D. Meyer for 3/64ths of said net profits under said contract of August 31, 1922, and withholding in a
424 special fund 1/64th of said net profits as aforesaid, and that said R. D. Meyer made no objection thereto. That said R. D. Meyer under the circumstances was under a duty to speak and to inform this defendant of his claim, if any, to said 1/64th of said net profits, but that notwithstanding said duty to speak as aforesaid, said R. D. Meyer with full knowledge of the facts as aforesaid, acquiesced in such course of dealing, accepted payments regularly for
425 such 3/64ths of the net profits, and did not make any request or demand upon this defendant either to pay said 1/64th net

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profits to him or to withhold the same from payment to the defendants, William B. Milliken and Margaret M. Milliken, or either of them.

"That if said Meyer had objected to such retention of said 1/64th of the net profits in such special fund as aforesaid, and had he demanded that this defendant pay the same over to him, this defendant
426 would not have paid the same to said Margaret M. Milliken. That the foregoing state of facts constituted a representation of fact on the part of said Meyer, which representation of fact it was intended that this defendant should rely upon. That this defendant made said payment to defendant Margaret M. Milliken relying upon such apparent acceptance by said R. D. Meyer of, and his acquiescence in, said decree of July 11, 1931. That in making said payment this defendant changed its position to its prejudice and thereby R. D. Meyer in his lifetime was, and plaintiff now is, estopped to make any claim against this defendant on account of said 1/64th of the net profits interest from production from said 'Moffat Pool' as to any and all money paid by this defendant
427 to said defendant Margaret M. Milliken prior to the institution of this action. That the amount of money, on account of said 1/64th interest in the net profits, so paid to said Margaret M. Milliken prior to the bringing of this action is in the sum of

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Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49). This defendant further admits that up to the date of the filing of the complaint herein, any money owing to the estate of said R. D. Meyer for the third quarter of the year 1935, ending September 30, 1935, had not yet been determined and had not been
428 paid to said estate. This defendant denies each, every and all of the allegations, matters and things contained in Paragraph Twenty-first of said complaint not herein expressly admitted, confessed or avoided."

VI.

428 Denies all allegations in Paragraph "Twenty-second."

VII.

429 Admits the allegations in Paragraph "Twenty-third" and "Twenty-fourth."

VIII.

429 "Admits that the attorney for said R. D. Meyer, sometime in September, 1935, received a reply from the attorney for this defendant by a letter bearing date of September 28, 1935, and stating that upon the demand of the defendant, Margaret M. Milliken, claiming to be and as the assignee of the defendant William B. Milliken, this defendant paid to said Margaret M. Milliken the money representing 1/64th of the net profits from the operation of said 'Moffat Pool', in the sum of Four Thousand Three Hundred Thirty-five and 49/100 Dollars ($4,335.49) on

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March 16, 1935, and that it thereafter paid to her on account of said 1/64th interest in said net profits the sum of Two
430 Hundred Fifty-one and 11/100 Dollars ($251.11) on May 16, 1935, and Two Hundred Forty-two and 89/100 Dollars ($242.89) on August 15, 1935. This defendant denies each, every and all of the other allegations, matters and things contained in Paragraph Twenty-fifth of said complaint not herein expressly admitted, confessed or avoided."

IX.

"As to whether or not the said 1/64th interest in the net proceeds from operations in said 'Moffat Pool', now in dispute between the plaintiff and the defendants, William B. Milliken and Margaret M. Milliken, is the property of said plain-
431 tiff, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, but this defendant alleges that said 1/64th interest in the net proceeds from operations was assigned by William B. Milliken to Transcontinental Oil Company on May 3, 1924. This defendant further alleges that the
432 said payments hereinabove referred to, so made by it to said Margaret M. Milliken, representing said 1/64th of the net profits from said operations of the 'Moffat Pool' were made relying on said decree, set forth in Paragraph Twentieth of the plaintiff's complaint, and further relying

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upon the laches of said R. D. Meyer, and the further fact that although said R. D. Meyer was fully informed of the entry of said decree and of its contents, he acquiesced therein. That said R. D. Meyer did not at any time until shortly prior to the institution of this action, make any claim to or in any way notify this defendant that he questioned said judgment or that he claimed the same to be void, nor did he claim a right to payments from said 1/64th interest in said net profits until shortly prior to bringing this action. That by reason of said silence of said R. D. Meyer at a time when he was under a duty to speak, said R. D. Meyer was guilty of laches, and was and this plaintiff is
433 now estopped to make any claim or demand against this defendant on account of said payment so made to said Margaret M. Milliken. This defendant further alleges that in the event it should be held by this court that said decree of the District Court of Wyoming, in and for Carbon County, set forth in Paragraph Twentieth of plaintiff's complaint, should be set aside, that such payment of Four Thousand Eight Hundred Twenty-nine and 49/100
434 Dollars ($4,829.49) so made to Margaret M. Milliken was made by mistake of fact, and in equity and good conscience the same should thereupon be repaid, together with legal interest thereon from the date when said payments were made as afore-

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said, by said Margaret M. Milliken to this defendant, or into the registry of this court for the person or persons properly entitled thereto. Defendant denies each, every and all of the other allegations, matters and things contained in Paragraph Twenty-sixth of plaintiff's complaint not hereinabove expressly admitted, confessed or avoided."

X.

435 Denies each and every allegation in Paragraphs "Twenty-seventh," "Twenty-eighth," "Twenty-ninth," "Thirtieth," and "Thirty-first" of the complaint.

XI.

"This defendant denies each and every allegation and each and every part of every allegation of said complaint and the amendments thereto not hereinbefore in this answer expressly admitted."

SECOND AND FURTHER DEFENSE.

436 "And for a second, further and separate answer and defense this defendant alleges:

"That plaintiffs are estopped at this time to make any claim or demand against this defendant on account of said payment of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49) made by it to said Margaret M. Milliken, representing said 1/64th of the net profits from said operations of the

437 'Moffat Pool', for the reason that said R.

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D. Meyer was at all times fully informed and aware of the entry of said decree of July 11, 1931, and the contents thereof, and the various steps leading up to the entry of said decree as set forth in plaintiff's complaint, and that said R. D. Meyer at all times knew that this defendant was accounting to and paying to said R. D. Meyer for 3/64th of the net profits interest owned by said Meyer, and that by reason of said decree this defendant was withholding from him all payments repre-
438 senting the 1/64th of the net profits referred to in said decree; that under the circumstances said R. D. Meyer was under a duty to speak and to inform this defendant of his claims, if any, to said 1/64th of said net profits; but that notwithstanding said duty to speak as aforesaid, said R. D. Meyer made no objection to the withholding of said 1/64th of the net profits, and did not make any request or demand upon this defendant either to pay said 1/64th of the net profits to him or to withhold the same from payment to the defendants William B. Milliken and Margaret M. Milliken, or either of them, but on the other hand said Meyer with full knowledge of the facts as aforesaid acquiesced in such course of dealing, accepted payments regularly from this defendant and voiced no objection to the failure of this defendant to make said payments or any part thereof to him; that if said

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Meyer had objected to this defendant withholding payment from him of said 1/64th interest of the net profits, and had he demanded that this defendant should not pay
439 the same to anyone else other than to him, this defendant would not have paid said 1/64th interest to the defendant Margaret M. Milliken. That said silence of said R. D. Meyer constituted a representation of fact that he accepted and acquiesced in said decree of July 11, 1931, upon which representation of fact it was intended that this defendant should rely, and this defendant did rely thereon. That this defendant, relying upon the decree of said District Court for the Second Judicial District in and for the County of Carbon,
440 State of Wyoming, set forth in full in Paragraph Twentieth of plaintiff's complaint, and relying upon the said acquiescence of said R. D. Meyer in said judgment by his silence for a period of nearly four years, and upon demand of the defendant William B. Milliken and Margaret M. Milliken, paid to said defendant Margaret M. Milliken the total sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49); that said payment was made to said Margaret M. Milliken whereby this defendant changed
441 its position to its prejudice. That plaintiff herein, as was R. D. Meyer in his lifetime, is now estopped to make any claim against this defendant for any money

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paid over on account of said 1/64th of the net profits from production from said 'Moffat Pool' made by this defendant prior to the institution of this action. This defendant alleges that to now permit plaintiff to maintain an action to recover from it said amount so paid by defendant to said Margaret M. Milliken would, for the reasons aforesaid, work a great hardship on and an injustice and irreparable injury to defendant. This defendant further alleges that said R. D. Meyer's said acquiescence and representations as aforesaid resulted in plaintiff, as well as R. D. Meyer during his lifetime, being guilty of laches and constituted a waiver of any rights which plaintiff may claim or demand against this defendant on account of said payment of Four Thousand Eight
442 Hundred Twenty-nine and 49/100 Dollars ($4,829.49) to said Margaret M. Milliken."

442 THIRD AND FURTHER DEFENSE AND CROSS-COMPLAINT AGAINST DEFENDANTS WILLIAM B. MILLIKEN AND MARGARET M. MILLIKEN.

"This defendant, further answering, and by way of Cross-complaint against the
443 defendants William B. Milliken and Margaret M. Milliken, alleges:

I.

"That this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio and

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duly qualified to do business in the State of Colorado.

II.

"This defendant hereby adopts, al-
444 leges, and incorporates by reference all of the matters and things contained in Paragraphs First, Second, Third, Sixth Eighth, Twelfth, Thirteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth and Twentieth of plaintiff's complaint herein.

III.

"That subsequent to the signing of the decree by the District Court of Carbon County, Wyoming, set forth in paragraph Twentieth of plaintiff's complaint, and the filing of the same with the Clerk of said Court, and beginning with the quarter ending June 30, 1931, this defendant The Ohio Oil Company (to which said Transcontinental Oil Company has assigned all of its remaining interest in and to said agreement of August 31, 1922, between Transcontinental Oil Company and R. D. Meyer) in reporting and remitting to said R. D. Meyer on account of the quarterly
445 net profits earnings from said 'Moffat Pool', paid to said R. D. Meyer only 3/64ths of said net profits, and until the 16th day of March, 1935, this defendant retained in a special account or fund 1/64th of the net protfis from the production from said 'Moffat Pool'; that on said 16th day of March, 1935, upon demand of defendants, William B. Milliken and Mar-

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garet M. Milliken, and relying upon said decree of the District Court of Carbon County, Wyoming, of July 11, 1931, and
446 further relying upon the fact that said R. D. Meyer had taken no action to have said judgment and decree vacated or set aside, which failure of said R. D. Meyer to take action as aforesaid constituted a representation of fact that said R. D. Meyer accepted said judgment and decree as binding upon him, and believing that said Margaret M. Milliken was the proper person to whom to make such payment, by mistake of fact this defendant paid over to Margaret M. Milliken the sum of Four Thousand Three Hundred Thirty-five and 49/100 Dollars ($4,335.49), which represented the amount of money withheld in
447 said special account or fund on account of said 1/64th of said net profits up to January 1, 1935; that thereafter on the 16th day of May, 1935, and the 15th day of August, 1935, this defendant paid over to said Margaret M. Milliken the additional sums of Two Hundred Fifty-one and 11/100 Dollars ($251.11) and Two Hundred Forty-two and 89/100 Dollars $242.89) on account of said 1/64th interest in said net profits covering the first and second quarters of 1935 respectively; that each, every and all of said payments aggregating Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49) so made to Margaret M. Milliken

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were made by mistake of fact, as hereinabove in this paragraph set forth; that said payment constituted an unjust enrichment and overpayment to said Margaret M. Milliken beyond any sum or sums due to her on account of the net profits
448 from the production from said 'Moffat Pool' and that there was then nothing owing to said Margaret M. Milliken or to William B. Milliken under any contract between them, or either of them, and said Transcontinental Oil Company or this defendant; that in equity and good conscience such payments should be repaid by said Margaret M. Milliken and William B. Milliken to this defendant, together with legal interest thereon, or that in the event that this court should decree that the money constituting said special account or fund was paid to the wrong person and should have been paid to said R. D. Meyer,
449 or to the plaintiff herein, that it should be decreed that said Margaret M. Milliken and William B. Milliken repay the aggregate amount of payments so made to her by mistake as aforesaid, together with legal interest thereon to plaintiff in this action, and that thereupon this defendant should be relieved of all claims of liability therefor.

IV.

450 "That on the 3rd day of May, 1924, in order to settle all controversies with said William B. Milliken, said Transcon-

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tinental Oil Company assigned to William B. Milliken, who received and accepted the same, a 1/32nd interest in the net profits from oil and gas operations on said 'Moffat Pool' and at the same time and as a part of the same transaction the said William B. Milliken together with one Carl S. Milliken, entered into an agreement with said Transcontinental Oil Company of Colorado, which agreement recites that said William B. Milliken and Carl S. Milliken assert and maintain that they are entitled to, and are the owners of an undivided 2/3rds interest in a certain 1/16ths of the net profits which may be derived from oil and gas operations and development which may be conducted upon the properties, permits or leases, procured by R. D. Meyer and assigned to said Transcontinental Oil Company, under a contract dated August 31, 1922, which said last mentioned contract is set forth in paragraph Third of plaintiff's complaint herein, between said R. D. Meyer and said Transcontinental Oil Company; that by said agreement of May 3, 1924, said William B. Milliken and Carl S. Milliken jointly and severally sold, assigned and transferred to said Transcontinental Oil Company all and singular their right, interest, claim and demand of every kind or nature as against the said R. D. Meyer in anywise pertaining to any and all lands in Moffat, Routt and Rio Blanco Counties,

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452 Colorado, or the 1/16th interest in said net profits and the rights of said R. D. Meyer therein; that said 1/16th interest included the 1/64th interest now in dispute; that by reason of having assigned and transferred all his right, title and interest in said 1/16th interest in and to said net profits as aforesaid, said defendant William B. Milliken—and Margaret M. Milliken, as his assignee—were thereafter estopped to make any claims against this defendant as to said 1/64th interest of

453 the net profits from production from said 'Moffat Pool' and were not then, or thereafter, and are not now entitled to any part of the 1/64th interest in said net profits so retained by this defendant in a special fund or account as aforesaid; that the payments so made by this defendant to said Margaret M. Milliken, as hereinabove set forth, covering the 1/64th interest of said net profits were made by mistake of fact to the wrong person without any consideration moving from said Margaret M. Milliken or William B. Milliken, and because of forgetfulness of said agreement of May 3, 1924, and when nothing was due or owing to said Margaret M. Milliken or William B. Milliken under any contract between them or either of them and said Transcontinental Oil Company or this defendant; that the same constituted an unjust enrichment of Margaret M. Milliken and William B. Milliken and in equity and

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good conscience the same should be repaid by said Margaret M. Milliken and William
454 B. Milliken to this defendant, together with legal interest thereon from the respective dates of said payments.

V.

"That on or about the 29th day of November, 1935, this defendant demanded of defendants Margaret M. Milliken and William B. Milliken that said sums of money so paid to Margaret M. Milliken be repaid to this defendant, The Ohio Oil Company.

VI.

"That neither of said defendants, Mar-
455 garet M. Milliken nor William B. Milliken, has repaid to this defendant the said money, nor any part thereof.

"WHEREFORE, defendant The Ohio Oil Company prays that it may have judgment against the defendants William B. Milliken and Margaret M. Milliken in the total aggregate sum of Four Thousand Eight Hundred Twenty-nine and 49/100
456 Dollars ($4,829.49), together with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment, together with costs of suit and such other further and different relief as

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to the court may seem meet and proper in the premises.

Farrar & Martin,
M. B. Holt, Jr.,
Harold H. Healy,
Attorneys for Defendant,
The Ohio Oil Company"

459 REPLICATION TO THE ANSWER OF THE DEFENDANT TEXAS PRODUCTION COMPANY

460 "FIRST: That to whether or not there were times, as is alleged in Paragraph II of said Answer, during the period embraced in the Complaint herein, when there were no net profits interest as defined by the agreement set out in Paragraph 'THIRD' of the Complaint, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief and as to each and every other allegation of new matter therein contained this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief."

460 "SECOND: Avers the fact to be that the statutes of the State of Wyoming pertinent and applicable to the issues in this case and set out in WYOMING COMPILED STATUTES, 1920, Chapter 362, under the subject 'CONDUCT OF THE TRIAL' under sub-division 'ARTICLE I'

461 of said chapter 'TRIAL BY JURY AND VERDICT,' are the following:

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"'Sec. 5779. GENERAL AND SPECIAL VERDICTS. The verdict of a jury must be either general or special; a general verdict is that by which the jury finds generally upon all or any of the issues in favor of either the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, and it must present the facts as established by the evidence, and not the evidence to prove the facts; and the facts must be so presented that nothing shall remain to the court but to draw from them conclusions of law.'

462

"'Sec. 5780. WHEN JURY MAY RENDER GENERAL OR SPECIAL VERDICT. In actions for the recovery of money only, or specific real property, the jury may render either a general or a special verdict; in all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues; in all cases the court may instruct the jurors, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon; and the verdict or finding must be filed with the clerk and entered on the journal.'

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"'Sec. 5781. SPECIAL FINDING TO CONTROL GENERAL VER-

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DICT. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly.'

"And under sub-division 'ARTICLE II,' 'TRIAL BY THE COURT,' said chapter and subject matter, Section 5785 reads and is the following:

465 "'Sec. 5785. JURY PROVISIONS TO APPLY TO TRIAL BY COURT. The provisions of this chapter respecting trials by jury shall apply, so far as they are in their nature applicable, to trials by the court.'

"PLAINTIFF APPEARING BY HER SAID ATTORNEY AND REPLYING TO THE SO-CALLED SECOND AND FURTHER DEFENSE OF THE DEFENDANT TEXAS PRODUCTION COMPANY, ALLEGES AND SAYS;

466 "FIRST: Admits the allegations contained in the first seven lines and to and including the name 'Meyer' in the eighth line thereof, and denies each and every allegation therein contained beginning with the word 'and' in said eighth line, to and including the word 'interest' in the sixteenth line from the top of page 6 thereof; admits the following allegation thereof following the word 'and' to-wit:

'that said Transcontinental Oil Company and its successor in interest (the

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defendant The Ohio Oil Company) had a right to demand and receive payment for said interest from this defendant;'

denies each and every allegation thereof
467 beginning with the word 'that' in the nineteenth line from the top of said page 6, and ending with the word 'and' in the fifth line from the bottom of said page 6; admits that portion thereof beginning with the word 'at' in the fifth line from the bottom of said page 6 and ending with the word 'him' in the sixth line from the top of page 7 thereof; that as to the allegations therein contained beginning with the word 'that' in the sixth line from the top of said page 7, and ending with the word 'Meyer' in the twelfth line from the top of said page, this plaintiff has not and cannot obtain sufficient knowledge or
468 information upon which to base a belief; denies the allegations therein contained beginning with the word 'that' being the first word in the thirteenth line from the top of said page 7, and ending with the word 'defendant,' being the first word in the eighth line from the bottom of said page; admits:

'That the amounts sought to be recovered herein as net profits accruing to the said R. D. Meyer interest prior to
469 January 2nd, 1932, were a part of the amounts paid to the defendant The

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Ohio Oil Company by this defendant aforesaid;'

denies each and every other allegation contained in said so-called SECOND AND FURTHER DEFENSE not hereinbefore admitted, denied or put in issue.

"SECOND: Plaintiff adopts and by reference makes a part hereof paragraph 'SECOND' of its reply to defendant's so-called FIRST DEFENSE.

FOR HER REPLY TO THE SO-CALLED THIRD AND FURTHER DEFENSE OF THE DEFENDANT TEXAS PRODUCTION COMPANY PLAINTIFF ALLEGES:

"FIRST: She adopts and by reference makes a part hereof paragraphs 'FIRST' and 'SECOND' of her reply to said de-
470 fendant's FIRST DEFENSE.

"SECOND: Adopts and by reference makes a part hereof paragraphs 'FIRST' and 'SECOND' of her reply to said defendant's so-called SECOND AND FURTHER DEFENSE.

"THIRD: Plaintiff adopts and by reference makes a part hereof paragraph 'FIRST' of the reply to the THIRD AND FURTHER DEFENSE AND CROSS-COMPLAINT of the defendant The Ohio Oil Company.

"FOURTH: As to the matters and things alleged and set forth in paragraphs
471 II, III, and IV of the THIRD AND FUR-

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THER DEFENSE AND CROSS-COMPLAINT of the defendant Texas Production Company, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

REPLICATION TO ANSWER OF THE DEFENDANT THE OHIO OIL COMPANY.

475 "FIRST: Denies each and every allegation of new matter in paragraph II of said Answer, except that as to whether or not during the period of time set out in the Complaint and referred to in said paragraph II of the Answer there were times when there were no net profits interests as defined in the agreement of August 31, 1922, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief; and this plaintiff avers the fact to be that if the defendant Texas Production Company at or about January 2, A. D. 1932, or at any other time, parted with or alienated its interest in said agreement of August 31, 1922, or the lands or any thereof therein described, it continued to be and still is obligated to this plaintiff as are by the terms of its said agreement with said
476 Transcontinental Oil Company provided.

"SECOND: That as to paragraph V of said defendant's answer, beginning with the word 'that' in the eighth line from the top of page 4, and ending with

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the word 'avoided', being the last word in said paragraph V, admits that said R. D. Meyer was at all times fully informed and aware of the entry of the decree of July 11, 1931, and the contents thereof; that during all of said times from the date of the decree of July 11, 1931, until March 16, 1935, said defendant was accounting to

477 said R. D. Meyer for but 3/64ths of said net profits under said agreement of August 31, 1922, and was during said time withholding 1/64th of said net profits; that he accepted payments for 3/64ths of the net profits, and that the amount of money on account of said 1/64th interest, in the net profits, so paid to the defendant Margaret M. Milliken prior to the bringing of this action is the sum of $4,829.49; and this plaintiff denies each and every other allegation of new matter in said paragraph V contained, and avers the fact to be that said defendant The Ohio Oil

478 Company having acquired its admitted interest, being the remaining interest of said Transcontinental Oil Company, in said agreement of August 31, 1922, entered into between said R. D. Meyer and said Transcontinental Oil Company, together with said Transcontinental Oil Company's remaining interest in the lands therein described, subsequently participated in the defense of said Transcontinental Oil Company by and through its attorney R. G. Gwilliam in the trial of the

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cause in the District Court of Carbon County, Wyoming, wherein the decree referred to in said paragraph V of its answer was rendered, and from the date and entry of said decree on July 11, 1931, became and was at all times fully advised as to the contents of said decree, and being so advised of the contents thereof and
479 having as alleged in said paragraph V of its answer withheld said 1/64th net profits interest and retained the same in a special fund until March 16, 1935, it made no inquiry of said R. D. Meyer as to his claimed interest of said 1/64th so withheld, until May 24, 1935, when in reply to said Meyer's letter of inquiry relative to the 1/64th being so withheld by said defendant, which letter of inquiry bears date May 20, 1935, said defendant by its attorney, Mr. Hal W. Stewart, wrote said Meyer as per letter set out in paragraph
480 'TWENTY-THIRD' of plaintiff's Complaint, which is hereby adopted by reference, made a part hereof, well knowing that on two occasions prior to the 16th day of March, A. D. 1935, and following the entry of said decree said Meyer had made inquiry in writing of it, said defendant, as to the amount of money that was being withheld and retained by it, which writings disclose and disclosed to said defendant that said Meyer was interested in and making claim of ownership of said 1/64th net profits interest so being

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withheld and retained by it, and which by
481 letters received by said R. D. Meyer in his lifetime from the defendant The Ohio Oil Company through its various representatives indicated and led said Meyer at all times to believe, and this plaintiff to believe, that no part of said 1/64th net profits interest was being paid to any person, but that it was being retained by the defendant The Ohio Oil Company.

"That further replying to said paragraph V and in particular to the first four line at the top of page 5 of its Answer and ending with the word 'Milliken,' being the first word in the fifth line from the top of said page, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

482 "THIRD: Replying to paragraph IX of the Answer of said defendant, plaintiff avers that the 1/64th interest in the net proceeds from operations in said Moffat Pool is the property of this plaintiff, and denies that said 1/64th interest in the net profits from said operations was assigned by William B, Milliken and Carl S. Milliken to Transcontinental Oil Company on May 3, 1924; but avers the fact to be that on said date said two named persons made, executed and delivered to Transcontinental Oil Company a writing, as is set out at pages 48 and 49 of the Com-
483 plaint herein, and which is by reference made part hereof, but as to what was

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'assigned it is shown at said page 49 to be the following:

'NOW, THEREFORE, for and in consideration of the sum of Ten (10.00) dollars and other good and valuable considerations passing from the said second party to the said first parties, and the receipt of which is hereby acknowledged, the said first parties and each of them jointly and severally,
484 have sold, assigned and transferred and do hereby sell, assign and transfer unto the said party of the second part, all and singular their right, interest, claim and demand, of every kind or nature, as against the said R. D. Meyer in any wise pertaining to any and all lands in Moffat, Routt, and Rio Blanco counties, Colorado, or the one-sixteenth (1/16) interest in said net profits, and the rights of said R. D. Meyer therein;'

and said 1/64th was at no time owned by or subject to assignment by William B. Milliken and Carl S. Milliken, or either of them, to said Transcontinental Oil Company.

"Admits that the payments made by the defendant The Ohio Oil Company to the defendant Margaret M. Milliken 'were made relying on said decree, set forth in
485 Paragraph Twentieth of plaintiff's complaint,' as is alleged in paragraph IX of its Answer, and avers the fact to be that

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said decree is void and is a nullity, and further avers the fact to be that said decree so set out at paragraph 'TWENTIETH' of the Complaint herein, and by reference made a part hereof, does *not* decree to the defendant William B. Milliken, nor to any other person, the 1/64th net profits interest involved in this action, nor any part or portion thereof, and said Carbon County, Wyoming, Court was without jurisdiction, right or authority to have adjudged said 1/64th interest, or any part thereof, to the defendant William B. Milliken as the statutes of the State of Wyoming pertinent and applicable to the issues in this case and set out in WYOMING COMPILED STATUTES, 1920, Chapter 362, under the subject 'CONDUCT OF THE TRIAL' under sub-division 'ARTICLE I' of said chapter 'TRIAL BY JURY AND VERDICT,' are the following:

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'Sec. 5779. GENERAL AND SPECIAL VERDICTS. The verdict of a jury must be either general or special; a general verdict is that by which the jury finds generally upon all or any of the issues in favor of either the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, and it must present the facts as established by the evidence, and not the evidence to prove the facts; and the facts must be so presented that

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nothing shall remain to the court but to draw from them conclusions of law.'

'Sec. 5780. WHEN JURY MAY RENDER GENERAL OR SPECIAL VERDICT. In actions for the recov-

488 ery of money only, or specific real property, the jury may render either a general or a special verdict; in all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues; in all cases the court may instruct the jurors, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and

489 may direct a written finding thereon; and the verdict or finding must be filed with the clerk and entered on the journal.'

'Sec. 5781. SPECIAL FINDING TO CONTROL GENERAL VERDICT. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court make give judgment accordingly.'

490 "And under sub-division 'ARTICLE II,' 'TRIAL BY THE COURT,' said chapter and subject matter, Section 5785 reads and is the following:

'Sec. 5785. JURY PROVISIONS TO APPLY TO TRIAL BY COURT. The provisions of this chapter respecting

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trials by jury *shall apply*, so far as they are in their nature applicable, to trials by the court.'

"That said Transcontinental Oil Company at no time claimed as against this plaintiff or her predecessor in ownership anything by virtue of said assignment by William B. Milliken and his son Carl S. Milliken.

"Plaintiff denies each and every allegation of new matter in said FIRST DEFENSE alleged that has not heretofore
491 been by plaintiff admitted, denied, put in issue, qualified, avoided or explained.

"FOR A REPLY TO THE 'SECOND AND FURTHER DEFENSE' OF THE DEFENDANT THE OHIO OIL COMPANY, PLAINTIFF ALLEGES AND SAYS:

"FIRST: Admits that said R. D. Meyer was at all times fully informed and aware of the entry of said decree of July 11, 1931, and the contents thereof, and the various steps leading up to the entry of said decree as set forth in the Complaint herein, and that said defendant was ac-
492 counting to and paying to him but 3/64ths of the net profits interest owned by him, and that by reason of said decree said defendant was withholding from him the 1/64th of the net profits referred to in said decree; 'that the defendant The Ohio Oil Company, relying upon the decree of

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said District Court for the Second Judicial District in and for the County of Carbon, State of Wyoming, set forth in full in Paragraph Twentieth of plaintiff's com-
493 plaint,' made payment to the defendant Margaret M. Milliken of $4,829.49 as is alleged by said defendant at page 9 of its answer; denies each and every other allegation of new matter in said SECOND AND FURTHER DEFENSE contained, and avers the fact to be that as is alleged in the complaint herein and in the Answer of the defendant The Ohio Oil Company, it acquired the remaining interest of Transcontinental Oil Company in and to the agreement of August 31, 1922, entered into by and between said R. D. Meyer and said Transcontinental Oil Company, and acquired as well its remaining interest in and to the lands therein described at or about April 1, 1931, and prior to the trial of the cause wherein the defendant William B. Milliken was plaintiff and said Transcontinental Oil Company and said R. D. Meyer were defend-
494 ants, which said cause was tried in the month of May following such acquisition of interests by the defendant The Ohio Oil Company, and in which trial it participated through its attorney R. C. Gwilliam to a conclusion thereof, and the rendition and entry of the decree therein, and set out at paragraph 'TWENTIETH' of the Complaint in this action, which said

decree was and is as to form approved by its said attorney, R. C. Gwilliam, and which said decree of said Wyoming court is by reference made a part hereof, and said defendant was at all times herein mentioned fully advised as to the contents of said decree of the Carbon County, Wyo-

495 ming, Court, and is charged as matter of law with knowledge of its invalidity and insufficiency as applicable to the 1/64th net profits interest herein involved, which is *not* by said decree adjudged or awarded to said William B. Milliken or to any person for him or for his use, or to or for the use of any other person, and, therefore, as a matter of law and matter of fact at all times remained and still is the property of this plaintiff and her predecessor in ownership.

496 "Plaintiff denies each and every allegation of new matter in said SECOND AND FURTHER DEFENSE contained not heretofore admitted, denied, put in issue, qualified, avoided or explained, and says that said alleged SECOND AND FURTHER DEFENSE is incomplete and does not state facts sufficient to constitute a defense to the Complaint herein.

"That said Transcontinental Oil Company at no time claimed as against this plaintiff or her predecessor in ownership anything by virtue of said assignment by William B. Milliken and his son Carl S. Milliken.

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"And further replying to said alleged SECOND AND FURTHER DEFENSE,
497 plaintiff alleges that the statutes of the State of Wyoming pertinent and applicable to the issues in said cause in the Carbon County, Wyoming, court are Sections 5779, 5780, 5781 and 5785 of the 1920 Compiled Statutes of said State as set out at pages 5 and 6 of this reply, which are hereby adopted and by reference made a part hereof.

"That the withholding, retaining and depositing in a special fund of the said 1/64th net profits interest, and paying of same to the defendant Margaret M. Milliken constituted and constitutes, was and
498 is, an unauthorized, illegal and arbitrary exercise of assumed power and without even a 'void' judgment to lend it support.

REPLYING TO THE THIRD AND FURTHER DEFENSE AND CROSS COMPLAINT AGAINST DEFENDANTS WILLIAM B. MILLIKEN AND MARGARET M. MILLIKEN INSOFAR AS IT APPLIES TO THE PLAINTIFF AND HER COMPLAINT, PLAINTIFF ALLEGES AND SAYS:

"FIRST: Admits the allegations of the defendant therein to and including the
499 date of July 11, 1931, in the first line at the top of page 11 thereof; denies the allegations therein beginning with the word 'and,' being next to the last word in said

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first line at the top of page 11, and ending with the word 'fact' in the eighth line from the top of said page; admits the allegation beginning with the word 'this' in said eighth line, and ending with the figures '$4829.49' in parenthesis in the fourteenth line from the bottom of said page 11; denies the allegations beginning with the word 'so' in said fourteenth line from the bottom of said page 11, and ending with the word 'forth' in the thirteenth line from the bottom of said page; admits the allegation beginning with the word 'that' in the thirteenth line from the bottom of said page 11, and ending with the word 'thereon' in the fourth line from the bottom of said page 11; and as to the remaining portion of paragraph III plain-
500 tiff avers that in the event the Court decrees that the money constituting said special account or fund was paid to the wrong person and should have been paid to said R. D. Meyer or to the plaintiff herein, that it should then decree that said Margaret M. Milliken and William B. Milliken make payment of the aggregate amount of payments so made to her by the defendant The Ohio Oil Company, together with legal interest thereon either to said defendant company or to the plaintiff herein, and that said defendant be not relieved from liability therefor until full
501 payment shall have been made to this plaintiff.

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"SECOND: Admits the allegations in paragraph IV thereof.

AMENDED ANSWER OF THE DEFENDANTS WILLIAM B. MILLIKEN AND MARGARET M. MILLIKEN TO THE COMPLAINT AS AMENDED.

504 1. Admit the allegations in Paragraphs "First" and "Second."

2. Put Paragraph "Third" in issue.

3. Put the allegations in Paragraph "Fourth" in issue.

505 4. Admit the allegations in Paragraphs "Fifth" and "Sixth."

5. Put in issue Paragraph "Seventh."

505-506 6. Admit the allegations in Paragraph "Eighth."

506-507 7. Deny the allegations in Paragraph "Ninth" and allege that at the date of the commencement of the action in the Wyoming Court, Meyer was and for many years prior thereto had been, and for several years subsequent, was a resident of Wyoming, and had departed from his residence to avoid the service of summons in said cause, and on or about July 26, 1927, and continually thereafter until July 11, 1931, the date of the judgment in said cause, he remained out of the State of Wyoming and concealed himself for the purpose of avoiding the service of summons issued out of said court in said cause.

508 8. Admit the allegations in Paragraphs "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," "Sixteenth," "Sev-

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enteenth," "Eighteenth," "Nineteenth," "Twentieth" and "Twenty-first."

508-509 9. Put in issue Paragraphs "Twenty-second," "Twenty-third," "Twenty-fourth," "Twenty-fifth," and "Twenty-sixth."

509 10. Deny the allegations in Paragraphs "Twenty-seventh," "Twenty-eighth," "Twenty-ninth," "Thirtieth," and "Thirty-first," and allege:

510 "(a) That said R. D. Meyer, deceased, was on the 26th day of March, 1928, and for many years prior thereto had been, and for several years subsequent to said date was a resident of the State of Wyoming, and as such resident of the State of Wyoming had consented to service of process in actions filed against him in the State of Wyoming in the manner and form provided for by the statutes and laws of the State of Wyoming, and the

510 said R. D. Meyer was on said date subject to service of process in actions filed against him in the State of Wyoming in the manner and form as provided by the statutes of Wyoming for service of process on its residents and citizens; that the filing of the affidavit for constructive service set forth in paragraph 12 of plaintiff's complaint as amended and the service upon said R. D. Meyer in Denver, Colorado, on

511 or about March 30th, 1928, of a copy of the summons issued out of said District Court of Carbon County, Wyoming, in said action of 'W. B. Milliken, plaintiff,

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against Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants', together with a copy of the petition filed in said cause, and which said copy of said petition had been filed with the Clerk of said Wyoming court on July 26th, 1927, all as alleged in paragraph 13 of plaintiff's bill of complaint as amended, gave said
512 District Court of Carbon County, Wyoming, jurisdiction over the person of said R. D. Meyer as a resident and citizen of the State of Wyoming under and pursuant to its statutes and laws. (b) That although said R. D. Meyer was actually and personally served with said summons and a copy of the petition in Denver, Colorado, as aforesaid, he made no appearance in said District Court of Carbon County, Wyoming, for the purpose of questioning
513 the jurisdiction of said Court over his person and made no appearance in said court for the purpose of questioning the matters and things set forth in said affidavit for constructive service; that the judgment and decree of said District Court of Carbon County, Wyoming, was made, rendered and entered on July 11, 1931, as appears from the allegations of paragraph 20 of plaintiff's complaint as amended; that said R. D. Meyer did not die until August 17th, 1935, and between the date of the entry of said decree of said District Court of Carbon County, Wyoming, and until a few days before his death

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said R. D. Meyer was in good health and mentally competent; that said R. D. Meyer during his lifetime made no appearance in said cause in said District Court of Carbon County, Wyoming, for the purpose of moving to vacate or set aside said judgment of said Court made
514 and entered against him, and said R. D. Meyer never at any time filed any petition or complaint in said District Court of Carbon County, Wyoming, or in any other court of Wyoming for the purpose of attacking the validity of said judgment and decree and vacating the same.

"(c) That Section 5923, W. C. S. 1920, (now Section 89-2301, W. R. S. 1931) provided and provides in part:

"'A district court may vacate or modify its own judgment or order after the term at which the same was
515 made: * * *

"'(2). By a new trial granted in proceedings against defendants constructively summoned, as provided in Sec. 89-817;

"'(3). For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order;

"'(4). For fraud practiced by the successful party in obtaining a judgment order.'

516 "That Section 5926, W. C. S. 1920, (now Section 89-2304, W. R. S. 1931), provided and provides:

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" 'The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action; but the motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term.'

"That Section 5929, Wyoming Compiled Statutes, 1920, (now Section 89-2305, Wyoming Revised Statutes 1931), provided and provides:

" 'The proceedings to vacate the judgment or order on the grounds specified in sub-divisions four, five, six, seven, eight, nine and ten of Section 89-2301, shall be by petition, verified by affidavit setting forth the judgment or order, the grounds to vacate or modify it, and if the party applying was defendant, the defense to the action, and on such petition a

518 summons shall issue and be served as in the commencement of an action.'

"That Section 5932, Wyoming Compiled Statutes, 1920, (now Section 89-2310, Wyoming Revised Statutes 1931) provided and provides:

" 'Proceedings to vacate or modify a judgment or order for the causes mentioned in sub-divisions four, five,

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and seven of Section 89-2301, must be commenced within two years after the judgment was rendered, or order made, unless the party entitled thereto is an infant or a person of unsound mind, and in cases of such disability, within two years after the removal thereof; proceedings for the causes mentioned in sub-divisions three and six of the same section shall be commenced within three years, and in sub-division nine within two years after the defendant has notice of the judgment.'

519

"(d) That by reason of the foregoing statutes of the State of Wyoming and the decisions of the Supreme Court of the State of Wyoming construing the same the said judgment and decree of the District Court of Carbon County, Wyoming, is now and for some years has been a final and conclusive judgment and decree which under the statutes and laws of the State of Wyoming is not now and for some years last past has not been subject to be vacated, modified or set aside in any particular or upon any ground or reason.

520

"(e) That said District Court of Carbon county, Wyoming, had judisdiction of the subject-matter of said action and had jurisdiction of the person of said R. D. Meyer and the judgment and the decree of said court set forth in plaintiff's complaint as amended was and at all times

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since its entry has been and is now a valid
251 decree of said District Court of Carbon County, Wyoming, and said judgment and decree is entitled to full faith and credit in the State of Colorado, and elsewhere, that under the facts and circumstances set forth in plaintiff's complaint as amended and under the statutes and laws of the State of Wyoming no Wyoming court has jurisdiction or authority to set aside or vacate said judgment and decree or enjoin the enforcement thereof, and by virtue of the full faith and credit clause
522 of the Federal Constitution (Section 1, Article IV, Constitution of the United States), said judgment and decree of said District Court of Carbon County, Wyoming, is entitled to have the same faith and credit as it now has, and has always had since the date of its entry in the State of Wyoming, and if this court should refuse to give said judgment and decree of said District Court of Carbon County, Wyoming, full faith and credit as a valid and effective judgment and decree, such refusal would constitute a violation of said Article IV, Section 1 of the Constitution of the United States, and the rights of these defendants, and each of them, thereunder.

"WHEREFORE, said defendants, having now answered said complaint as amended, pray that said action be dismissed at the cost of the plaintiff; and for

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523 such other, further and general relief in the premises as to this Honorable Court may seem meet, just and proper.

Alter & Upton,
C. R. Ellery,
Attorneys for defendants
William B. Milliken and
Margaret M. Milliken."

526 REPLICATION TO THE AMENDED ANSWER OF THE DEFENDANTS WILLIAM B. MILLIKEN AND MARGARET M. MILLIKEN TO THE COMPLAINT AS AMENDED

527 "FIRST: That as to subdivision (a) of paragraph 10 plaintiff admits that said R. D. Meyer was a resident of the State of Wyoming for many years, but at no date subsequent to the year 1920, and denies each and every other allegation in said subdivision contained; replying to subdivision (b) of said paragraph 10 plaintiff admits that said R. D. Meyer was served with summons and a copy of the petition in Denver, Colorado, but denies that he was actually so served, and avers the fact to be that he was but constructively so served; admits that he made no appearance in the District Court of Carbon County, Wyoming, for the purpose of questioning the jurisdiction of said court
528 or for the purpose of questioning the matters and things set forth in said affidavit

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for constructive service; that the judgment and decree of said District Court of Carbon County, Wyoming, was made, rendered and entered on July 11, 1931, as is alleged and set forth in paragraph TWENTIETH of plaintiff's complaint; that said R. D. Meyer did not die until August 17, 1935, and that he was in good health and mentally competent not during the entire period between the date of said
529 decree and the date of his death, but was during the greater portion of said time; that he at no time made any appearance in said cause in said court for the purpose of moving to vacate or set aside said judgment, and that he at no time filed any petition or complaint in said court or in any other court of Wyoming for the purpose of attacking the validity of said judgment and decree and vacating the same.

529 "That as to subdivision (c) admits
530 that Sections 5923 and 5926 Wyoming Compiled Statutes, 1920, read as set forth in said amended answer.

"Avers the fact to be that Section 5927 and not Section 5929 reads as is set forth in said amended answer.

"Admits that Section 5932 of Wyoming Compiled Statutes, 1929, reads as is set forth in said amended answer, except that subdivisions 4, 5, and 7 of section 5923 are the subdivisions set forth in said statutes of 1920 and not *'89-2301'* as is set

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forth in said amended answer, and while the remaining portion of said Section 5923 reads as is set out in said amended answer, it is but a portion of said Section 5923; and

"This plaintiff denies each and every other allegation of new matter in said amended answer contained.

"SECOND: Plaintiff avers the facts to be that the statutes of the State of Wyoming pertinent and applicable to the issues
531 in this case and set out in Wyoming Compiled Statutes of 1920, chapter 362, under the subject 'CONDUCT OF THE TRIAL' under subdivision 'ARTICLE I' of said chapter 'TRIAL BY JURY AND VERDICT' are the following:

"'Sec. 5779. GENERAL AND SPECIAL VERDICTS. The verdict of a jury must be either general or special; a general verdict is that by which the jury finds generally upon all or any of the issues in favor of
532 either the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, and it must present the facts as established by the evidence, and not the evidence to prove the facts; and the facts must be so presented that nothing shall remain to the court but to draw from them conclusions of law.'

533 "'Sec. 5780. WHEN JURY MAY RENDER GENERAL OR SPECIAL

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VERDICT. In actions for the recovery of money only, or specific real property, the jury may render either a general or a special verdict; in all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues; in all cases the court may instruct the jurors, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon; and the verdict or finding must be filed with the clerk and entered on the journal.'

534 "'Sec. 5781. SPECIAL FINDING TO CONTROL GENERAL VERDICT. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly.'

"And under sub-division 'ARTICLE II,' 'TRIAL BY THE COURT,' said chapter and subject matter, Section 5785 reads and is the following:

535 "'Sec. 5785. JURY PROVISIONS TO APPLY TO TRIAL BY COURT. The provisions of this chapter respecting trials by jury shall apply, so far as they are in their nature applicable, to trials by the court.'

"That said statutes, Chapter 308, 'MECHANICS AND BUILDERS' LIENS,'

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536

Section 4870, 'PARTIES TO ACTION—Constructive service,' reads as follows:

"'In all suits under this chapter the parties to the controversy shall, and all other persons interested in the matter in controversy, and in the property charged in the lien, may be made parties, but such as are not made parties shall not be bound by any such proceeding, and constructive service may be had upon any defendant in suits brought under this chapter who may be non-residents of the state and cannot be personally served with the summons within the state in the same manner as constructive service is had in other cases at law.'

"Section 4872. 'JUDGMENT BY DEFAULT' reads as follows:

"'Judgment by default shall be rendered against every defendant who, after being duly summoned or notified, according to law, shall not appear and plead or answer within the time allowed by law in ordinary civil actions.'

"Section 4873, 'JUDGMENT ON CONSTRUCTIVE SERVICE' reads as follows:

"'When the debtor has not been personally served with process according to law, but has been lawfully notified by publication, the judgment, if for the plaintiff, shall be that he

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recover the amount of the indebtedness found to be due and the cost of suit, to be levied out of the property charged with the lien therefor, which said property shall be correctly described in said judgment.'

"And Section 4874, 'JUDGMENT ON PERSONAL SERVICE' reads as follows:

"'When the debtor has been served with summons, or appears at the action without service of summons, the judgment, if for the plaintiff, shall be against such debtor, as in ordinary cases, with the addition that if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof to be levied as provided in the next preceding section.'

537 "That said statutes, Chapter 366, under the subject 'JUDGMENT IN GENERAL' Section 5885 'JUDGMENT FOR CONVEYANCE—Effect' reads as follows:

"'When the party against whom a judgment for a conveyance, release or acquittance is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformably to such judgment.'

538 "That said statutes, Chapter 368, MANNER OF GIVING AND ENTER-

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"ING JUDGMENT' Section 5903, 'FROM
538 WHAT COMPLETE RECORD MADE,' reads as follows:

"'The records shall be made up from the petition, the process, the return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account, or the copies of papers at-
539 tached to the pleadings are voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely; and evidence must not be recorded.'

"That said statutes, Chapter 359, 'COMMENCEMENT OF ACTIONS—SERVICE' 'ARTICLE I ACTUAL SERVICE' Section 5628 'SERVICE AND RETURN OF SUMMONS' reads as follows:

"'That service shall be by delivery at any time before the return day, a copy of the summons with the indorsements thereon, together with a copy of the petition to the defendant personally, or by leaving a copy of the summons and petition at his usual
540 place of residence with some member of his family, or other person in his employ over the age of fourteen years, or if the defendant is a partnership, sued by its company name, by leaving a copy of the summons and petition

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at its usual place of doing business; and the return must be made at the time mentioned in the writ, and the
541 time and manner of service shall be stated on the writ.'

"And the subject of constructive service as provided by said statutes under said Chapter 359, Article II, is as is set forth in its entirety in paragraph TWELFTH of the complaint herein as amended, and is by reference made a part hereof.

"WHEREFORE, plaintff having fully replied to the amended answer, asks the judgment and decree of this Court as is prayed for in her complaint.

W. E. Clark
Attorney for Plaintiff"

OPENING STATEMENTS

MR. HEALY: * * * We have taken the position in the pleadings that we paid out the sum of approximately $4800.00 to Mrs. Milliken, one of the co-defendants relying upon the decree of the Wyoming court. So that we claim we relied on that decree, not only so far as plaintiff is concerned—and plaintiff has admitted that we made the payment relying on
548 the decree—but that we made that payment relying on the decree and on the demand of Mrs. Milliken. Therefore, if this court should decide that payment should have been made to plaintiff, rather than to Mrs. Milliken, then it is our position, as between our company and Mrs. Milliken, that we should be entitled to

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judgment over and against her in event judgment should go for plaintiff, but only in that event, because of course we are not entitled to
549 the money, it belongs either to plaintiff or defendants Milliken; but we feel that we should not be required to pay it twice under the circumstances of this case.

MR. LAND: * * * For the same reasons as stated by Mr. Healy, Texas Production Company also has a cross action against the defendants Milliken. The money that Texas Production Company paid The Ohio Oil Company and Transcontinental Oil Company, its predecessor, was paid to defendants Milliken, and in event plaintiff is entitled to judgment against the defendant Texas Production
550 Company, it asks for judgment over and against the defendants Milliken. It also asks for judgment against The Ohio Oil Company for the same reason that the Ohio Oil Company asks for judgment over and against the defendants Milliken. The money was paid The Ohio Oil Company or Tarnscontinental Oil Company, its predecessor, and if they were not entitled to the money or did not make proper disposition of it, the defendant Texas Production Company asks for judgment against them.

551 MR. ALTER: Mr. Ellery and my firm represent the defendants Milliken. So far as the cross-complaints of The Ohio Oil Company and Texas Production Company are concerned, we are willing to stipulate that in event your Honor should ultimately grant the relief prayed by the plaintiff and a judgment should be

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rendered against either Texas Production Company or The Ohio Oil Company, that one or the other of them is entitled to a judgment on their cross-complaint against the defendants Milliken; without reference, however, to any matters now existing between The Ohio Oil Company and its predecessor, as between
552 Millikens and themselves, about which I know very little. So that, so far as this case is concerned, if Your Honor should ultimately conclude that judgment should go against either one of those companies in behalf of plaintiff, we are consenting, without prejudice to the rights I have mentioned, to judgment against Millikens for a like amount.

MR. HEALY: If the Court please, there is no issue, except as it may appear in the pleadings, between The Ohio Oil Company and Texas Production Company. I am perfectly
553 willing to stipulate that if the court should find judgment for any amount against Texas Production Company, that then judgment for the same amount should be found in favor of Texas Production Company and against The Ohio Oil Company.

MR. CLARK: I desire at this time to
587 call Mrs. Milliken for cross-examination under the statute.

PLAINTIFF'S TESTIMONY.

MARGARET M. MILLIKEN, a defendant herein, called by plaintiff for cross-examination under the statute, being first duly sworn, testified as follows:

FOLIO

CROSS-EXAMINATION

BY MR. CLARK:

588 Q. State your name, please. A. Margaret M. Milliken.

Q. Your are one of the defendants in this action? A. I am.

Q. Defendant William B. Milliken is your husband? A. Yes.

Q. You reside in Denver, do you? A. I do.

Q. Does he reside in Denver? A. He does.

Q. For how long a period have you resided in Denver? A. Since 1919. Pardon me,
589 I have been out of the State four years during that time.

Q. Denver has been your home all the time, has it? A. I lived in California for four years.

Q. Are you familiar, at least to an extent, with the litigation which your husband had with Transcontinental Oil Company and R. D. Meyer in Wyoming some few years since? A. Yes, I am.

Q. You have, since that time, acquired some interest in your husband's claimed holdings in connection with the judgment that was rendered in this court, have you? A. I think it was in 1934.

Q. What did you acquire in that behalf? A. I acquired his interest.

590 Q. You acquired his interest in what? A. In this judgment against Mr. Meyer, the amount in question, and the 1/64th.

FOLIO

Q. That is, the amount of the money judgment, is that what you mean to say? A. Yes.

Q. You acquired from him, then everything that he assumes to have secured by virtue of that judgment, is that it? A. Yes, that's it.

591 Q. He assigned to you his entire interest in the judgment, is that it? A. Yes.

Q. Then that included, you say, 1/64th net profits interest in production from the Moffat Pool on the Hamilton Dome in the western part of this State near Craig? A. It included all and the additional amount which they were holding, which The Ohio Oil Company were holding.

592 Q. You acquired all that The Ohio Oil Company was withholding from Mr. Meyer up to the time you received this money, is that what you mean?

MR. ALTER: I am quite sure that is a written instrument and it will speak for itself.

MR. CLARK: I want to know something besides what it says.

MR. ALTER: You are now inquiring about a written document. We object to it, as the written document is the best evidence.

THE COURT: Overruled. This is cross-examination.

MR. ALTER: Exception.

593 Q. Can you answer? A. I don't just want you to catch me up on something.

Q. I don't want to. I am trying to be fair with you, and I intend to be? A. I acquired

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his interest, which included this 1/64th which we always did have, and then this amount which they were holding, and the judgment.

Q. When you said which you always did get, you did not mean to say 1/64th, you meant 1/32nd, didn't you? A. Whatever the
594 interest is; I forget. This 1/64th was the additional amount. The 1/32nd was what we first had.

Q. I don't want to confuse you. If you don't understand me just answer that you want to be advised more fully, or any way you care to express it. You did, about the 16th of March, 1935, receive a voucher from The Ohio Oil Company for $4,335.49? That was the first amount you were paid at that time? A. I
595 guess so, if that was the correct amount.

Q. That was the amount, as you understood it, that The Ohio Oil Company and Texas Production Company were withholding from Mr. Meyer from the time the judgment was rendered in Wyoming? A. Yes, I understood that was the amount.

Q. And that it came from that particular source and it was the money they were withholding from Mr. Meyer? A. Yes.

Q. Later you received two other payments from The Ohio Oil Company and Texas Production Company, aside from the regular payments which you received on account of your 1/32nd interest, didn't you?

MR. ALTER: We have stipulated all that, your Honor.

MR. CLARK: Yes, as to the amounts,

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but they were very careful to not say whose money it was or where it came from, and that
596 is what I am trying to identify.

THE COURT: Go ahead.

A. I did.

Q. One of those amounts was $251.11? A. I don't just remember the amounts.

Q. And don't remember the other one was for $242.89? It is stipulated, however, as to the amounts. You understood, did you, when you were receiving those two amounts, that
597 they were additional moneys that had been withheld by the oil companies from Mr. Meyer? A. I did.

MR. CLARK: I believe that is all.

MR. ALTER: No examination at this time, as far as we are concerned.

MR. HEALY: No examination.

Plaintiff took the deposition of H. H. Wonder, and, accordingly, this witness testified:

716 I am and have been employed by The Ohio Oil Company as an accountant for approximately nineteen years, and on January 12, 1932, R. C. Gwilliam was an attorney for the Ohio Oil Company.

719 In answer to cross-interrogatory No. 1, witness stated that he knew of the payment of $4,333.49 on March 16, 1935, to Margaret M. Milliken; the sum of $251.11 on May 16, 1935, to the same person, and, likewise, the sum of $242.89 on August 15, 1935.

In answer to cross-interrogatory No. 2, witness testified that in making the payments

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to Margaret M. Milliken the decree of the District Court of Carbon County, Wyoming, dated July 11, 1931, entitled W. B. Milliken, Plaintiff v. Transcontinental Oil Company, a Corporation, and R. D. Meyer, Defendants, was taken into consideration and full force and effect was given to that decree and reliance placed thereon, and also upon the fact the decree was final and by it it was adjudged that R. D. Meyer and W. B. Milliken were each entitled to a 3/64th net profit interest in the subject matter of the litigation, and by the decree R. D. Meyer was enjoined from receiving and the Transcontinental Oil Company, which was the predecessor of The Ohio Oil Company, was enjoined from paying R. D. Meyer more than a 3/64ths of the net profits interest.

720 In answer to cross-interrogatory No. 3, witness testified that R. D. Meyer made no objection prior to May 1, 1935, to The Ohio Oil Company's payment of the net profits interest as commanded in the decree of the District Court of Carbon County, Wyoming.

In answer to cross-interrogatory No. 4, witness stated that R. D. Meyer made no objection to the withholding of the 1/64th net profit interest and it was considered that the decree of the District Court of Carbon County was final. Because Meyer had taken no action to set it aside, it was assumed that he must be satisfied with it. Meyer made no objection to the withholding of the 1/64th net profit interest; never requested that it be paid to him,

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and never indicated that he would assert any claim for its payment to him, and during the time that the 1/64th net profit interest was withheld, Meyer accepted payment of the 3/64ths net profit interest. Meyer took no steps to remove, dissolve or vacate the injunction against the Transcontinental Oil Company by which the Transcontinental Oil Company was restrained from making payment of the 1/64th net profit interest to any one excepting Milliken or his assignee.

721 In answer to cross-interrogatory No. 5, witness stated that the decree of the Carbon County District Court found W. B. Milliken to be the owner of 3/64ths net profit interest in the property involved and The Ohio Oil Company was furnished proof that Margaret
722 M. Milliken was the assignee of W. B. Milliken. The payment of this 1/64th net profit interest which had been awarded W. B. Milliken in the decree of the District Court of Carbon County was withheld by The Ohio Oil Company until it had been advised that W. B. Milliken's appeal from the decision of the judgment of the Carbon County District Court had been dismissed. Thereafter the net profit interest from the 1/64th was paid in accordance with the assignment because there were no appeals pending and no action taken to void the Wyoming decree and no person, excepting Mrs. Milliken, had asserted any claim or made any demand for the payment of the 1/64th interest.

The 3 following letters addressed by R. D.

FOLIO

Meyer to H. H. Wonder of The Ohio Oil Co. are attached to the deposition of H. H. Wonder, and are the following.

"Denver, Colorado,
May 20, 1935.

Mr. H. H. Wonder,
The Ohio Oil Co.,
Findlay, Ohio.

Dear Sir:

I am herewith returning you statement rendered in connection with the Moffat Pool Colorado operations for the quarter ending March 1935.

723 . Please enter thereon my 1/16th interest in full showing exact amount placed in the Hold a/c for the quarter, all in accordance with the form of statements rendered in the past. Also please advise the balance of the Hold a/c as of December 31st 1934.

Thanking you

Yours very truly

R. D. Meyer.

EXHIBIT "D"

MARGARET WILSON
Commissioner.

Denver, Colorado
May 26, 1932.

Mr. H. H. Wonder,
Ohio Oil Company,
Findlay, Ohio.

Dear Sir:

I have just received statement and check

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in the amount of $1,077.42 covering a 3/64ths payment of net profits from the Moffat Pool Colorado operation for the quarter ending March 31-1932.

724 The statement however does not show that a 1/64ths is being withheld by you. In order that my records may be complete for the quarter will you kindly write me a letter stating the exact amount in dollars and cents of the 1/64th withheld.

Thanking you

Yours very truly

R. D. MEYER.

EXHIBIT "B"

Margaret Wilson
Commissioner.

Denver, Colorado
December 30-1931.

Mr. H. H. Wonder,
The Ohio Oil Company,
Findlay, Ohio.

Dear Sir:

Have not yet received statement of the Moffat Pool Colorado operation for the quarter ending September 30-1931.

725 Will you kindly forward statement and oblige,

Very truly yours,

R. D. MEYER.

FOLIO

EXHIBIT "A"

Margaret Wilson
Commissioner.

Produced by the Ohio Oil Co. upon demand.

Plffs Ex. K
A-14043

1114 Logan Street,
Denver, Colorado
February 18-1933.

Mr. H. H. Wonder,
1015 The Ohio Oil Company
Findlay, Ohio.

Dear Sir:

I am just in receipt of statement and check for $1164.17 in connection with the Moffat Pool Colorado operations for the quarter ending December 31-1932.

In the preparation of this statement, I observe however that no provision has been made for my interest as being a 1/16th from which you are withholding a 1/64th.

Will you kindly therefore write me a letter covering this feature, advising exact amount of the 1/64th withheld for the quarter and the grand total now withheld for all quarters as of date December 31-1932.

Thanking you,

Yours very truly,

R. D. MEYER.

The following 3 letters written to R. D. Meyer are attached to and are a part of the deposition of H. H. Wonder, with The Ohio Oil Company:

FOLIO

THE OHIO OIL CO.

Casper, Wyoming,
January 12, 1932.

Mr. R. D. Meyer,
1114 Logan St.,
Denver, Colorado.

Dear Sir:

704 Your letter of December 30, 1931, addressed to Mr. H. H. Wonder at Findlay, Ohio, has been referred to me for answer.

Due to certain complications which have arisen by reason of our difficulties in the surrender of certain lands in connection with our Colorado lease Denver 033221-B, which are lands located in the Moffat Pool, Colorado, there will be some delay in sending you your statement.

Yours truly,
R. C. GWILLIAM,
Attorney.

RCG/D

THE OHIO OIL CO.

Findlay, Ohio
June 1, 1932

Mr. R. D. Meyer,
1114 Logan Street,
Denver, Colorado.

Dear Sir:

705 In reply to the request contained in your letter of May 26, 1932, wish to advise that we are withholding 1/64th of the net profits from the Moffat Pool, Colorado, operations for the quarter ending March 31, 1932, which amounts to $359.14.

Yours very truly,
H. H. WONDER.

HHW:mp

FOLIO

THE OHIO OIL CO.

Findlay, Ohio
February 21, 1933.

Mr. R. D. Meyer
1114 Logan Street
Denver, Colorado.
Dear Sir:

706 We acknowledge receipt of your letter of February 18, 1933, in which you ask us to advise the amount of the 1/64th interest we are withholding.

We withheld $388.05 covering this 1/64th interest for the quarter ending December 31, 1932. The total amount withheld as of December 31, 1932 is $2336.90.

Yours truly,
H. H. WONDER.

THE OHIO OIL CO.

A. M. GEE
General Counsel
Hal W. Stewart
G. E. McCullough
R. H. Fletcher
Attorneys.

Findlay, Ohio
May 24, 1935.

Mr. R. D. Meyer
1114 Logan Street
Denver, Colorado.
Dear Sir:

I have before me your letter of May 20, 1935, returning the statement for the first quarter of 1935 concerning operations on

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lease Denver 033221-a (our 383-a) in the Moffat Pool in Colorado. The situation is being reviewed for the purpose of determining whether or not 1/64th net profits interest should be continued to be held or should be paid to Margaret Milliken as assignee of W. B. Milliken. In order that we may be in
707 better position to determine this matter will you kindly furnish me documentary evidence upon which you base your claim to this 1/64th interest.

If, upon conclusion of the matter, it appears that the statements to you should properly show the amount involved in this 1/64th, statement will be sent to you. For your convenience in the meantime I am returning herewith the statement for the first quarter of 1935 and if any additions are to be made to such statement because of such 1/64th interest, such additions will be made by a supplementary statement.

Very truly yours,
HAL W. STEWART.

HWS:MP
Enc.

Plffs. Ex. N.
(A14043)

THE OHIO OIL CO.

Casper, Wyoming,
Oct. 29, 1931.

Mr. R. D. Meyer,
1018 1114 Logan St.
Denver, Colorado.
Dear Mr. Meyer:

As per my understanding with you and

FOLIO

Mr. Clark of sometime ago, I am herewith enclosing check of The Ohio Oil Company payable to you in the amount of $788.28, this check being No. 76473, in payment of a 3/64th net profit interest in the Hamilton Dome. As I told you and Mr. Clark, I am withholding the 1/64 interest which is involved in the Milliken-Transcontinental suit. I am also enclosing herewith a statement covering the second quarter of 1931 upon which this payment is based.

Our Findlay office advises that they have written the Department of the Interior to determine if it is possible to reinstate lands now held under oil and gas lease to the permit status, and will advise you immediately upon receipt of the Department's answer.

Yours truly,

R. C. GWILLIAM,
Attorney.

RCG/D
Encls.
CC—C. W. Roberts,
W. E. Clark.

The deposition of Charles J. Ohnhaus, clerk of the United States District Court for the District of Wyoming, was taken.

747 Witness testified that he was the clerk of the United States District Court for the District of Wyoming and had in his posses-
748 sion and custody the files in the case of W. B. Milliken v. Transcontinental Oil Company, a corporation, and R. D. Meyer, Defendants, and among the files was an instrument
749 marked "Motion to Remand, and Answer to

FOLIO

Petition for Removal.". The motion to re-
750 mand was granted and the files in court were returned to the District Court at Rawlins, Wyoming, and attached to the deposition and
751 marked "Exhibit A" thereto are certified copies of the Motion to Remand, and Answer to Petition for Removal and Order of Remand.

Identified and part of the deposition of Charles J. Ohnhaus, Clerk of the Federal Court at Cheyenne, Wyoming:

"Pl. Ex. "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

W. B. MILLIKEN,
Plaintiff,

vs.

755 TRANSCONTINENTAL OIL COMPANY, a corporation, and R. D. MEYER,
Defendants.

Filed
Sept. 26, 1927
Charles J. Ohnhaus
Clerk.

No. 1774 Civil
Motion to Remand and Answer to Petition for Removal

MOTION TO REMAND

Comes now the above named plaintiff, W. B. Milliken, and moves this court to remand the above entitled cause to the District Court of the Second Judicial District of the State of Wyoming in and for the County of Car-
756 bon, from which court it was attempted to

FOLIO

be removed, on the grounds and for the reasons:

I.

That the record of said cause does not present a case removable from the state court to this court under the statutes governing such cases.

II.

That the record in said cause does not present a separable controversy in contemplation of the act authorizing the removal of causes.

III.

757 The requisite diverse citizenship required as a condition precedent to the jurisdiction of this court in a controversy of the character presented in this record does not exist.

IV.

That it appears from the record that this is an action by one member of a joint adventure against the two other members of said joint adventure for the purpose of an accounting, and that therefore, both of said defendant members of said joint adventure are indispensable parties-defendant, and that one of said indispensable parties-defendant is a citizen and resident of the State of Wyoming, and that said action is therefore not removable.

V.

That it does not appear affirmatively in the record in this cause that the defendant, Transcontinental Oil Company, was at the time of the commencement of this action and

FOLIO

at the time of the filing of the petition for removal a non-resident of the State of Wyoming.

VI.

758 That the petition for removal is made by the defendant, Transcontinental Oil Company, alone, the defendant, R. D. Meyer, not joining therein.

ANSWER TO PETITION FOR REMOVAL.

I.

The plaintiff admits that the defendant, R. D. Meyer, is and was at the time of the commencement of this suit a citizen of the State of Wyoming.

II.

759 Plaintiff denies that there is in this action a separable controversy between him and the defendant, Transcontinental Oil Company, and further denies that the joinder of the defendant, R. D. Meyer, was or is fraudulent, or was for the purpose of defeating a removal, and in this regard plaintiff alleges that this is an action brought by the plaintiff as one of three co-joint adventurers against the other two co-joint adventurers, the defendants herein, for an accounting, and the gist of the petition is that the two defendants agreed and conspired to defraud plaintiff out
760 of his just and fair share of the profits of the joint adventure enterprise, and in such action both of said defendants are indispensable parties-defendant.

FOLIO

III.

Plaintiff denies that the dismissal of the former suit mentioned in its petition for removal and the joinder and insertion of R. D. Meyer as a defendant herein, and the claim that he is interested in and was a party to said joint adventure agreement is false and fraudulent, or was done for the purpose of attempting to defeat a removal of this case, and plaintiff alleges in this regard that said former case was dismissed because of the fact that counsel for plaintiff, upon making a more careful investigation of the facts and the points of law involved in the former case, determined that said R. D. Meyer was a party to said joint adventure agreement mentioned in the petition, and that it was through the combined and joint wrongful acts and conduct of the said R. D. Meyer, and the defendant, Transcontinental Oil Company, that the plaintiff had been defrauded of his fair and proper share in the profits of the joint adventure enterprise, and that, therefore, said R. D. Meyer was an indispensable party-defendant in any suit brought upon said joint adventure agreement for an ac-
761 counting against the other members thereof.

IV.

Plaintiff denies that said R. D. Meyer should be aligned with the plaintiff in this cause on the ground that the petition contains allegations directly charging a wrongful conspiracy and agreement upon the part of the two defendants to defraud the plaintiff of his

FOLIO

fair and proper share in the profits of the joint adventure enterprise; that said defendants are directly and specifically in the position charged jointly with wrongful acts and conduct.

DILLON, ELLERY & SPENCER,
Attorneys for Plaintiff.

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

C. R. ELLERY, being first duly sworn, upon oath deposes and says that he is one of
762 the attorneys for the plaintiff in the above entitled action, and makes this verification for and on behalf of this plaintiff; that he has read the foregoing Motion and Answer, and knows the contents thereof, and that the same is true, as he verily believes.

C. R. ELLERY.

Subscribed and sworn to before me this 24th day of September, 1927.

M. Cryderman,
(NOTARIAL SEAL) Notary Public.

765 The order remanding the cause to the
767 District Court of Carbon County, Wyoming.

DEFENDANTS' TESTIMONY

895 H. N. WOODMAN, a witness called by defendants, testified:

I am a certified shorthand reporter and also a notary public, and I recall a dedimus issued to me in a case entitled "In the Dis-
896 trict Court, District No. 3 of the State of

FOLIO

Wyoming. within and for the County of Carbon. W. B. Milliken, Plaintiff v. Transcontinental Oil Company, a Corporation, and R. D. Meyer, Defendants," which dedimus was issued about January 28, 1931. Mr. Meyer's deposition was taken on oral interrogatories, and reading from the deposition after com-
897 paring the same with my shorthand notes, Mr. Meyer stated that he was 52 years of age and temporarily making his home in
898 Denver and had lived in Denver about 12
899 years. Mr. Meyer stated that he had been living temporarily in Denver and prior to
900 coming to Denver lived in Wyoming and was "brought up there." In response to the question as to whether he held his legal residence in Wyoming, Mr. Meyer stated, "Well, of course, that is a question that I am not qualified to properly elucidate. I can only say, for your information, that I am a taxpayer in Carbon County, Wyoming, and that I have always had a feeling that some day I might return there and reestablish my association in Wyoming. In fact, I have never voted in
901 Denver." And witness Meyer further testified: "A. Ever since you moved to Denver you have regarded yourself as a citizen and resident of Wyoming, have you not? A. Well, that may be doubtful, Mr. Ellery."

HAROLD H. HEALY, a witness called by
913 defendants, testified: I am an attorney at law residing in Casper, Wyoming, and am ad-
914 mitted to practice my profession in that state. I represent The Ohio Oil Company and am

FOLIO

familiar with the statutes of Wyoming concerning oil companies and prospectors' per-
918 mits, and I am familiar with Section 712 of the 1920 Wyoming Compilation which was amended and reenacted in 1921 (Chapter 62, Session Laws of Wyoming, 1921), which original and amendatory section of the Wyoming statute gives a preference right to residents of Wyoming in connection with oil and gas prospector's leases, the preference appearing in the statute as follows:

"Preference shall in all cases be given to applications for leases of either state or school lands to persons who are resident citizens and taxpayers of the state and applications made by citizens of the state who hold title to lands nearest to any state or school lands applied for and for actual and necessary use for the land applied for and are not applying for the lease for speculation or sale shall be given a preference right over all other applicants to lease the same at such rental as the Board shall deem equitable and just."

921 The 1921 amendment made no change respecting preference rights to resident citizens and taxpayers.

922 BERNICE C. GILL, a witness called by defendants, testified:

My name is Bernice C. Gill and I reside at Cheyenne, Wyoming, and I am Deputy Commissioner of Public Lands for Wyoming.
923 I have here the original files in our office relative to applications for oil and gas leases

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filed by Raymond D. Meyer, or R. D. Meyer.
924 I have also, as part of the office files, an appeal from the Commissioner's decision taken by R. D. Meyer, and in it this statement occurs, "That appellant is a citizen, elector,
927 taxpayer and legal resident of the State of Wyoming and has been such for many years past," and it was dated "Received" November 10, 1920.

924 Defendants' Exhibits 2 to 13, inclusive,
953 identified by witness.

929 Defendants' Exhibit 3, being an affidavit of Raymond D. Meyer in which is the following: "Raymond D. Meyer, of lawful age, * * * that in the year 1906, and for many years prior thereto and up to the present time deponent was and is a resident, citizen, elector and taxpayer of the State of Wyoming. Affiant's postoffice address, Elk Mountain also
930 Fort Steele, Wyoming." This affidavit is dated November 10, 1920.

934 Defendants' Exhibit 4, dated October 1, 1920, in an application for prospector's lease
935 and is signed by R. D. Meyer, applicant, and in it is contained the following: "I am a voter and taxpayer in Carbon County, Wyoming."

FINDINGS AND JUDGMENT

This case has been extremely well tried and exhaustively argued by counsel for all parties involved. The conduct of the trial showed infinite industry on the part of all counsel. For that reason I feel that I am
979 just as well advised on the law and facts

FOLIO

of this case right now as I ever will be, and, furthermore, at this time I have a firm conviction as to what the judgment of this court ought to be.

Many interesting and intriguing questions have been presented during the trial, such as the sufficiency of the complaint, the right of the plaintiff to maintain the suit, the sufficiency of the defense of laches pleaded
980 by one of the defendants, and many other questions which, however, in view of the conclusion I have reached, seem to me unnecessary to be now decided. Likewise, in view of that conclusion, detail findings and decree in writing for the guidance of the parties and their counsel are not required, and, as I see it, could serve no useful purpose. I like to work, and I like to write opinions, but further deliberation and study on my part of the issues involved in this litigation seem unnecessary. I shall make some findings of fact and of law in deciding the case, some of which, perhaps, are not essential to support the conclusion reached. Accordingly I find
981 as follows:

That the statutes of Wyoming relating to constructive service, applicable and pleaded here, are constitutional. That R. D. Meyer, deceased husband of plaintiff, was legally domiciled in the State of Wyoming at the date of the commencement of the action in Wyoming, at the date of the filing of the affidavit in the Wyoming suit and at the date of the decree and judgment therein. I further

FOLIO

find that the affidavit of C. R. Ellery, filed in
982 the Wyoming suit as a basis for the constructive service on defendant Meyer, was made by him and filed in the case in good faith; that it substantially conforms to the statute in Wyoming relating to constructive service and that the affidavit in fact stated the truth.

It is further my opinion, and I so find, that the Wyoming court in which the case was filed and tried, and decree rendered, had
983 jurisdiction over the person of the defendant Meyer and had jurisdiciton to enter the decree and render the judgment which it did enter and render. In that connection, and answering one of the contentions of counsel for plaintiff that the court in Wyoming failed to follow the statutes relating to the form of decree, which statutes have been pleaded by plaintiff, if as a matter of fact there is conflict between the findings and the judgment, and if as a matter of fact the statutes of Wyoming in that connection were not followed by the court in rendering its decree, still it is my judgment that this matter should have been and could have been corrected on
984 appeal, and may have constituted error which the court on appeal would have corrected; but that does not and did not make the judgment void on its face. It is my judgment, and I further find, that the judgment of Wyoming assailed in this litigation is not void on its face and that, on the contrary, it appears from the pleadings here and the evidence taken in this case to be a valid and sub-

FOLIO

sisting judgment of full force and effect as to all parties concerned, and that it has not
985 in this trial been successfully impeached.

While perhaps not necessary entirely to the adjudication of this matter, it is my belief that the suit here constitutes a collateral attack on the Wyoming judgment.

For the foregoing reasons I find the issues joined in favor of the defendants and each of them, and against the plaintiff. I find there is no equity in the bill. The bill should
986 be dismissed. The bill is dismissed.

I think a motion for a new trial, if filed, would be overruled, and consequently dispense with the necessity of filing motion for new trial.

To which findings and judgment of the court, and to the entry of the judgment, the plaintiff by her counsel then and there duly excepted.

And thereupon plaintiff was granted thirty days' stay of execution and sixty days from
987 this day within which to prepare, tender and have signed and settled her Bill of Exceptions herein.

JUDGMENT ORDERED

The Court having this day ordered that judgment of dismissal in favor of defendants and against the plaintiff be entered herein, in acordance with the findings of the Court;
997 now therefore;

FOLIO

It is the order of the Court that this cause be, and hereby is, dismissed; that the defendants go hence hereof, and have and recover of and from the said plaintiff Violet L. Meyer, both individually and as Administratrix with the will annexed of the Estate of Raymond D. Meyer, deceased, their costs in this behalf laid out and expended, to be taxed; and have execution therefor.

PLFF'S Ex. A
(A-14043)

SECRETARY'S DOCUMENT
No. 157.

THIS AGREEMENT made and entered into this 21st day of June, A. D. 1923, by and between TRANSCONTINENTAL OIL COMPANY, a corporation organized and existing under the laws of the State of Delaware, hereinafter designated as First Party, 998 and TEXAS PRODUCTION COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Colorado, hereinafter designated as Second Party, WITNESSETH:

WHEREAS, First party owns and has the right to sell and assign the full applicants' or permittees' rights established, accrued, and to accrue under application for prospecting permit, serial number 022273, dated the 25th day of August, 1922, and filed by Arthur H. Hagan, and application for prospecting permit, serial number 022274, dated the 25th day of August, 1922, and filed

FOLIO

by Raymond D. Meyer, both of said applications having been filed in the United States Land Office at Glenwood Springs, Colorado, which applications, and the permits to be issued thereunder, relate to and embrace, among others, the following described lands, owned by the United States, hereinafter referred to and designated as the "property," situate in Moffat County, State of Colorado:

(Description of property)

* * * * * *

WHEREAS, Second party is desirous of acquiring an undivided one-half (½) interest in and to a portion of the property covered by said applications and the subsequent prospecting permits and leases which may be granted as the result of filing the applications hereinabove referred to, upon the terms and conditions hereinafter more fully set forth.

* * * * * *

FOURTH: That it is acknowledged and understood that all interests and estates in, of, or concerning any parts or portions of the property hereinbefore described and mentioned as hereby sold, assigned and conveyed, or hereunder to be sold, assigned, and conveyed by first party to second party, or by second party to first party, shall be taken and held in the hands of such assignee, and as such assignee's interest may appear, expressly subject to the full force and effect of that certain agreement, dated August 31, 1922, entered into by and between First Party and R. D. Meyer of Den-

FOLIO

ver, Colorado, copy of which agreement is hereto attached, marked Exhibit A, and made part hereof.

* * * * * *

Signed, sealed and delivered by Transcontinental Oil Company in the presence of:

TRANSCONTINENTAL OIL COMPANY,
By F. B. Parriott,
Its President.

ATTEST:

(Seal of Transcontinental Oil Company) T. R. Cowell,
Its Secretary.

Signed, sealed and delivered by Texas Production Company in the presence of:

TEXAS PRODUCTION COMPANY,
By Fred W. Freeman,
Its Vice-President.

ATTEST:

(Seal of Texas Production Company) A. R. Wilson,
Its Ass't. Secretary.

Plff's Ex. A-3
(A-14043)

TRANSCONTINENTAL OIL COMPANY,
Benedum-Trees Building, Pittsburgh, Pa.
April 4th, 1923.
(File No. 141-5)

1001 Judge F. W. Freeman,
Vice-President, The Texas Co.,
11th Floor, Foster Building,
Denver, Colorado.

Dear Judge Freeman:

In accordance with our verbal agreement relative to the main features of an agreement

FOLIO

between The Texas Co. and Transcontinental Oil Co. for a joint operation in townships four and five, North, Range 91 West, Moffat County, Colorado, on what is known locally as the "Hamilton Dome," I submit the following for your consideration.

* * * * * * *

First: That inasmuch as there seems to be a conflict of interest in Lots 5, 6, 11 and 12, Section 33, Township 5 North, Range 91 West, your company agrees to assign to our company an undivided one-half interest in said four lots in exchange for which our company will assign to your company the whole of lot 15, section 33, and lots 5 and 6, section 32, Township 5 North, Range 91 West.

Second: Your company agrees to assume one-half of the liability arising out of a certain contract with R. D. Meyer covering an undivided 1/16th interest in the above described land, said contract providing for a 1/16 net profit interest in same.

* * * * * * *

I have prepared and signed this letter in duplicate and if your ideas are in conformity with the foregoing expression of status of our negotiations to the present time I would ask you to please note your approval on the copy and return same to me or write me a letter of acceptance, just as you prefer. As stated, if this letter meets with your approval your acceptance will justify your immediately proceeding with the matters necessary to complete

FOLIO

action on the pending permits in Washington, and will justify your early commencement of operations for the drilling of the first well, and at such time as it is apparent that the permits will be granted, we will draft and forward final contract.

Yours very truly,
LEVI SMITH
LS/acf. FRED W. FREEMAN.

Plff's Ex. A-7
(A-14043)

September 26, 1931

Y. A. Land, Esq.
Attorney for Texas Production Co.,
University Building,
Denver.

Re: *Land File C-66*

1005 Dear Sir:

Your letter of September 25 addressed to me and copy furnished my attorney, W. E. Clark, duly received by me together with the assignment therein referred to executed in triplicate.

You are advised that Mr. Clark sent me a copy of his letter of the 18th addressed to you so that I am advised of its contents.

Following receipt of Mr. Clark's letter enclosing to me a copy of his said letter to you I referred to my files in connection with the transaction between Transcontinental Company and Texas Company, and the correspondence of Mr. Levi Smith, of Transcontinental Oil Company, and Attorney Freeman, for

FOLIO

Texas Company, clearly indicates that Texas Company in dealing with Transcontinental Company in connection with this land assumed the obligations of Transcontinental Company with me, and I refer to this because of the fact that Mr. Clark advised me that in his recent conversation with you you had stated that in so far as you are advised Texas Company dealt with Transcontinental Company *subject* to its obligations to me and did not assume same or any part thereof.

After having read your letter and the assignment referred to I took the matter up with Mr. Clark and feel that I cannot consistently accept the assignment as made, and am therefore returning to you two of the executed copies, and am retaining the other as matter of information for my files.

Your correspondence indicates that you are authorized to speak in these matters for the Ohio Oil Company as well as Texas Production Company, and in view of the assignment executed as it is I naturally assume you are speaking with full authority, and I am therefore returning these two copies of the assignment to you as I have had no correspondence with the Ohio Oil Company and naturally know that what I have said will be communicated by you to that company.

While writing in this connection I call to your attention for the Texas Production Company and the Ohio Oil Company as well the fact that while it is almost the first of October I have received no statement from Ohio Com-

FOLIO

pany as to the joint operations of the two for the quarter ending June 30, 1931, even though I wrote some time since to the Ohio Company at its home office at Findlay, Ohio, inquiring concerning it, to which letter I have to date received no reply.

Whether or not I am justified in what I am about to say may be questioned, but I have received from different sources of information that because of my recent litigation with W. B. Milliken payments would not be made to me in accordance with my contract with Transcontinental Company, which unquestionably Ohio Company has assumed to perform and which your company, as I am advised and as previously suggested, is also obligated to perform.

I trust that my information in that particular is not correct, and that Ohio and Texas Companies, and neither of them, is assuming by delaying in reporting to me to place me under pressure between the upper and nether millstones.

You will appreciate, or at least Mr. Gwilliams, who represented Ohio Oil Company at the trial and who is personally familiar with the petition of the plaintiff in that case, will appreciate, that the plaintiff was just as profuse in charging wrong doing on the part of Transcontinental Oil Company as he was in charging wrong doing on my part, and the Court's decree exonerates Transcontinental Oil Company and dismisses the action as to it though I never having appeared in that case nor been represented am adjudged a wrong

FOLIO

doer, and even though that action was dismissed as to Transcontinental Oil Company, which necessarily makes a final disposition of plaintiff's action against it, the decree assumes to enjoin Transcontinental from making further payment of 1/64th and I feel that your companies are certainly not justified in assumming to go farther than the Court's decree has gone.

I am unable to see wherein either of said companies is justified in declining to even report to me because of anything that may be contained in the decree in the case referred to though as previously suggested I have been advised that a promise is outstanding to the effect and to the extent that no further payments will be made to me under that contract, whereas there is certainly no right existing to withhold more than 1/64th of what the contract provides I shall be and am entitled to, and the Court's decree certainly in no way restricts my right to the quarterly report to which I have referred, and if the two companies you are representing are assuming to act as both Judge and jury in the determination of my rights I respectfully insist that in my opinion they are going without bounds, and in view of my past experience with Mr. Milliken, and having in mind the allegations of his petition in his recent action, I shall hope to not unwittingly do anything that might be construed to be a justification for the making of any of those allegations, and in conclusion simply say as I said in the beginning that I

FOLIO

cannot under all the facts and circumstances assume to consent to the making of the assignment.

Very truly yours,

WEC:EL R. D. MEYER.

Pltff's Ex. B
(A14043)

Denver, Colorado,
January 4, 1924.

1006

Mr. Raymond D. Meyer,
Apt. 7, 1114 Logan St.,
Denver, Colorado.

Dear Sir:

This will acknowledge receipt of the assignment executed by you, bearing date of January 4, 1924, and to confirm our agreement that said assignment is expressly subject to the full force and effect of that certain agreement dated August 31, 1922, entered into by Transcontinental Oil Company and yourself.

Yours very truly,
Texas Production Company,
By Fred W. Freeman,
Vice President.

(SEAL)
Attest:
By A. R. Wilson,
Assistant Secretary.

FOLIO

Pltff's Ex. C
(A14043)

TEXAS PRODUCTION COMPANY

A. R. Wilson,
Assistant Treasurer.

Denver, Colorado,
April 2, 1925.

Mr. R. D. Meyer
Apartment No. 7
1114 Logan Street
1007 Denver, Colorado.

Dear Sir:

I enclose herewith statement of expenditures and credits applicable to the Moffat Pool, Colorado, joint property of Transcontinental Oil Company and Texas Production Company from beginning through December, 1924.

In the future, similar statement will be furnished quarterly. Our next statement will cover the first quarter of 1925, which will be prepared in about 30 days.

Yours very truly,
A. R. Wilson,
Assistant Treasurer.

ARW-WDW
Wm. H. Weis

FOLIO

Pltff's Ex. D
(A14043)

TEXAS PRODUCTION COMPANY

A. R. Wilson, Denver, Colorado,
Assistant Treasurer May 5, 1925.

Statement of Expenditures and Credits

1008 Mr. R. D. Meyer
Apartment No. 7
1114 Logan Street
Denver, Colorado.

Dear Sir:

I enclose herewith statement of expenditures and credits applicable to the Moffat Pool, Colorado, joint property of Transcontinental Oil Company and Texas Production Company for the quarter ending March 31, 1925.

Yours, very truly,

JCH-WDW A. R. WILSON,

Plffs. Ex. E
(A14043)

TEXAS PRODUCTION COMPANY

A. R. Wilson, Denver, Colo.,
Assistant Treasurer February 2nd, 1926.

Moffat Pool Joint Properties
R. D. Meyer 1/16th Working Interest

Mr. R. D. Meyer,
Apartment No. 7,
1009 1114 Logan Street,
Denver, Colorado.

Dear Sir:

I enclose statement of expenditures and credits on the Moffat Pool Colorado joint prop-

FOLIO

erties of Texas Production Company and Transcontinental Oil Company in which you hold a certain working interest.

This statement covers the entire joint property operations and is perhaps subject to some adjustment after your interest is finally determined. It will be noted that the statment as rendered shows a profit from the operation for the quarter ending December 31. 1925, of $72,418.72.

We will not attempt to make settlement with you until we are advised by the Transconinental Oil Company that it is satisfactory to do so.

Yours very truly,
A. R WILSON,
Assistant Treasurer

ARW/E
Wm. H. Weiss,
Transco Oil Co.
Tulsa, Okla.

Plffs. Ex. I
(A14043)

THE TEXAS COMPANY

Legal Department
Denver, Colorado

Y. A. Land. October 7, 1931.

Land File C-66

1013 Mr. R. D. Meyer,
1114 Logan Street,
Denver, Colorado.

Dear Sir:

Upon my return to Denver I find your letter of September 26th, subject as above. It

FOLIO

has been referred to the Ohio Oil Company.

Permit me to say here, however, that from the facts which have been submitted to me by our people the Texas Production Company does not subscribe to your theory of its liabilities and obligations in this matter, but, on the other hand, takes the position that it has no contractual relations with you whatsoever pertaining to the land in question. The alleged failure of The Ohio Oil Company to comply with what you construe to be its obligations to you is something with respect to which we have no information.

Yours very truly,

Y. A. LAND,

YAL-CH Attorney for Texas Production Company.

Plffs. Ex. Q.
(A14043)

THE OHIO OIL CO.

A. M. Gee,
General Counsel
Hal W. Stewart
G. E. McCullough
R. H. Fletcher
Attorneys

Rec'd Sept. 30, 1935.

Findlay, Ohio
September 28, 1935.

Mr. W. E. Clark,
802 Midland Savings Building
Denver, Colorado

Re: Denver 033221 (a), Colorado 383 (a)

1021 Dear Mr. Clark:

I have not overlooked your letter of June

FOLIO

3 wherein you made a very complete explanation as to the relationship of Mr. R. D. Meyer to the 1/64th net profits interest claimed both by Mr. Meyer and by Margaret Milliken. I hope that you will pardon this delay in writing, part of which was occasioned by correspondence with Mr. Gwilliam, and trust that no harm has been done. I am returning herewith the statement and remittance slip for the first quarter of 1935, as you request

In order that we may all understand just how this matter has been handled, I give you a rather complete explanation of the status of our accounts concerning it. As you may know, W. B. Milliken transferred all of his interest in this lease to his wife, Margaret M. Milliken. In March of this year she demanded payment and advised that the appeal taken by Mr. Milliken from the lower court's decision in the case of W. B. Milliken against Transcontinental and Meyer had been dismissed. Our Casper office confirmed this statement and advised that the decree had determined that W. B. Milliken was entitled to 3/64th net profits interest. The amount that had been withheld for the 1/64th interest in controversy was released to Margaret M. Milliken on March 16, 1935, the amount released being $4,335.49.

Shortly after that time, upon receipt of word from you that Mr. Meyer still claimed to be the owner of this 1/64th interest, and upon receipt of your letter of June 3, I notified our Accounting Department to withhold all payments from W. B. Milliken or Margaret Milli-

FOLIO

ken for the reason that Mr. Meyer's claim still existed and the amount paid should have been withheld pending a final conclusion of the matter. However, the Accounting Department inadvertently did not withhold payments for the first and second quarters of this year, and paid to Mrs. Milliken $753.34 and $728.68 for the first and second quarters respectively, as 3/64 net profits interest. Of these amounts, 1/3 or $251.11 for the first quarter and $242.89 for the second quarter covered the 1/64 interest which is in controversy. Our Accounting Department has now had explicit instructions and will withhold payment from Margaret Milliken of all interest until the total of $4,824.49 is repaid to us from her 2/64 to which she is clearly entitled.

I am writing to Mrs. Milliken, explaining what is being done in this regard, but cannot predict just what her reaction will be, but anticipate that she will not like the idea.

I received your letter of September 15 with which you enclosed certified copy of letters appointing Violet L. Meyer as Administratrix with the will annexed of the Estate of Raymond D. Meyer. We are taking this into account and will render accounts and payments in the future to her as Administratrix with the will annexed.

Very truly yours,

HWS:MP HAL W. STEWART.

FOLIO

Pltfs. Ex. R
(A14043)

THIS AGREEMENT made and entered into this 31st day of August 1922, by and between R. D. MEYER, of Denver, Colorado, hereinafter designated as party of the first part, and TRANSCONTINENTAL OIL COMPANY, a Delaware corporation, herein represented by its duly authorized .....
1022 President, party of the second part, WITNESSETH That,

WHEREAS, heretofore party of the first part called attention to the possibilities of discovering oil and gas properties in western Routt, eastern Moffat, and Rio Blanco counties, in the state of Colorado, and,

WHEREAS, second party has caused a geological examination to be made in certain areas in said counties of said state;

NOW, THEREFORE, for and in consideration of the mutual covenants and stipulations hereinafter contained, the parties hereto have agreed and do hereby agree as follows:

First party covenants and agrees that he will immediately proceed to acquire the oil and gas rights in and to the lands described in the schedule annexed hereto, which schedule is hereby referred to and made a part hereof for all the purposes of this agreement and which schedule designates lands situate on and in the vicinity of the Beaver Creek anticline in Moffat and Routt counties, the Hamilton Dome and Axial Basin anticline in Moffat county,

and the Meeker Dome in Rio Blanco county, including other localities in the northwestern part of the state of Colorado.

It is understood by and between the parties hereto that at the time of the execution of this agreement a considerable portion or all of the mineral rights in and to said properties is vested in the United States and, as to such area, it will be necessary to execute and file applications for oil and gas prospecting permits under the terms and provisions of the United States oil leasing act of February 25, 1920, entitled "An Act to Promote the Mining of coal, phosphate, oil, oil shale, gas and sodium on the Public Domain."

It is understood and agreed that first party shall procure prospecting permits under the terms and provisions of said act free and clear of all conflicts and encumbrances covering the maximum area permitted under the terms and conditions of said act; and that, upon the issuance and delivery of said permits to first party, the latter agrees to assign and deliver unto the second party all of his right, title and interest in and to said permits pending the approval of the Department of the Interior of the United States to said assignment or assignments.

As to that portion of said lands, the fee ownership of which may now be vested in individuals, partnerships or corporations, or homestead, grazing, placer or other mineral rights which may have been acquired by third parties, first party agrees that he will submit to second

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party all such properties as may be on the market or available and second party shall have the right and option to accept or reject the same at the purchase price designated by the original holders or owners of said fee title or rights.

Second party agrees to pay the necessary traveling expenses of first party and the actual expense incurred in procuring said prospecting permits, options or leases and agrees to pay and deliver unto first party, one-sixteenth (1/16) of the net profits which may be derived from oil and gas operations and development which may be conducted upon the properties, permits or leases procured by first party and assigned to second party in accordance with the terms of this agreement. It is further understood and agreed that first party shall receive no salary or expense other than is fixed by the terms of this paragraph.

It is mutually understood and agreed by and between the parties hereto that should first party be unsuccessful in his efforts to procure any of the permits, leases or properties designated on the annexed schedule, that in such event this agreement shall "ipso fatco" become null and void as to those permits, leases or properties which first party is not able to, or does not acquire.

It is further mutually understood and agreed that second party shall have the right and option, at any time, to surrender, release, quit claim or forfeit any of the permits, leases or properties acquired in accordance with this

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agreement, or to cause first party to cease the acquisition and the further expense of acquiring any oil and gas rights for the account of second party, without any liability to first party or his assigns. Should second party decide to surrender, release or quit-claim any of the permits, leases or properties, second party will notify first party in all possible cases of second party's intention to relinquish said rights and upon notice from first party, second party will assign all of second's right, title and interest in and to those rights or properties intended to be relinquished.

It is mutually understood and agreed by and between the parties hereto that said net profits interest is hereby defined for all the purposes of this agreement as being one-sixteenth (1/16) of the net profits remaining after all taxes, fees, charges, expenses and royalties of any nature whatsoever, incurred or paid in acquiring, developing, operating, maintaining and legally safeguarding the oil and gas permits, leases or properties, or any of them, referred to herein, have been deducted from the gross income which may be derived from said operations and developments.

It is mutually understood and agreed, in the event that oil or gas be developed by second party, or its assigns, in paying quantities on said properties, that second party shall render quarterly statements to first party in carrying out the terms of this agreement and settlements hereunder shall be made upon this basis.

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It is further mutually understood and agreed by and between the parties hereto that second party shall have absolute and complete management and control of, and title to the properties or rights conveyed under the terms of this agreement and all operations and development thereon and production therefrom without let or hindrance of first party, and nothing herein contained shall be construed to make second party, or his assigns, liable to first party, or his assigns in any manner whatsoever in the event the second party, or his assigns, should elect not to commence drilling operations or development, or to cease drilling operations and development.

The rights and obligations of both parties hereto shall extend to their heirs and assigns.

In Witness Whereof, the parties hereto have signed this agreement the year and date first above written.

R. D. MEYER,

TRANSCONTINENTAL OIL COMPANY

By F. B. Parriott,

President.

Witness to signature of R. D. Meyer:

A. M. Hagan

W. B. Milliken.

(SEAL)

Attest:

T. R. Cowell,

Secretary.

Signed in the presence of:

E. C. Stearns

Anne Curren.

FOL

DEFENDANT'S EXHIBITS

The following exhibits by the defendants are No. 1, Fol. 1028 by the defendant Texas Production Co., an assignment of oil and gas leases from it to The Texas Company, a Delaware corporation bearing date Jan. 2nd, 1932. No. 5, Folio 1029, an application by R. D. Meyer, Trustee, apartment 7, Logan Apartments, 1114 Logan Street, Denver, Colorado, for Coal Prospector's Lease received by Commissioner of Public Lands of Wyoming, bearing date April 1st, 1929.

1029 An application for coal prospector's lease made by R. D. Meyer, Trustee, signed by R. D. Meyer, Trustee, dated April 1, 1929, in which is the following: "I am a resident of the State of Wyoming, I am a voter and taxpayer in Carbon County, Wyoming."

1030 Defendants' Exhibit 6 is an application for oil and gas prospector's lease, made by R. D. Meyer, Trustee, signed by R. D. Meyer, Trustee, dated April 6, 1927, and in it is the following: "I am a resident of the State of Wyoming. I am a voter and taxpayer in Carbon County, Wyoming."

1031 Defendants' Exhibit 7 is an application for coal prospector's lease, made by R. D. Meyer, Trustee, signed by R. D. Meyer, Trustee, dated March 16, 1928, and in it is the following: "I am a resident of the State of Wyoming. I am a voter and taxpayer in Carbon County, Wyoming."

1032 Defendants' Exhibit 8 is an application

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for oil and gas prospector's lease, made by R. D. Meyer, Trustee, signed by R. D. Meyer, Trustee, dated March 16, 1928, and in it is the following: "I am a resident of the State of Wyoming. I am a voter and taxpayer in Carbon County, Wyoming."

1033 Defendants' Exhibit 10 is an application for prospector's lease, made by R. D. Meyer, Trustee, signed by R. D. Meyer, Trustee, dated March 17, 1930, and in it is the following: "I have been a bona fide resident and taxpayer of Wyoming for 40 years."

1034 Defendants' Exhibit 11 is an application for prospector's lease made by R. D. Meyer, Trustee, signed by R. D. Meyer, Trustee, dated April 4, 1931, and in it is the following: "I have been a bona fide resident and taxpayer of Wyoming for 30 years."

1035 Defendants' Exhibit 12 is an application for prospector's lease made by R. D. Meyer, signed by R. D. Meyer, Trustee, dated April 9, 1932, and in it is the following: "I have been a bona fide resident and taxpayer of Wyoming for 20 years."

All of the foregoing applications pertain to Wyoming lands and are addressed to the Commissioner of Public Lands for the State of Wyoming.

ASSIGNMENTS OF ERROR.
(In Case No. 14,155)

Both the findings and judgment of the Trial Court are erroneous for the reasons following, to-wit:

FIRST: The defendant Meyer, in the Wyoming action was admittedly served with summons and copy of petition without the State of Wyoming and in the City and County of Denver in the State of Colorado.

SECOND: That the plaintiff in the action in Carbon County, Wyoming, had no cause of action at the time the suit was instituted by him as is found in Paragraph "Second" of the decree of the Wyoming Court wherein it is found that on May 3, 1924, the plaintiff Milliken in that action had for a valid consideration paid to him and received by him, without fraud, deceit or coercion, sold, assigned and conveyed his alleged cause of action both as against said Meyer and as against his one-sixteenth net profit interest to Transcontinental Oil Company, a joint defendant with said Meyer in said action and said action in the Wyoming Court was not instituted until the 26th day of July, A. D. 1927.

THIRD: That plaintiff Milliken's alleged cause of action in the Wyoming Court against the defendant Meyer, was void and non-existent and was a fraud upon both that Court and the defendant Meyer, in said action.

FOURTH: That the Wyoming Court, at the conclusion of the trial of the cause in that Court, found the issues in favor of the Transcontinental Oil Com-

pany which was a joint defendant with the defendant Meyer, and charged together with him as a joint tort feasor and such dismissal operated ipso facto as a dismissal of said action as to the defendant Meyer, as well.

FIFTH: That the named defendant Meyer, made no appearance in the Wyoming action, either general or special, neither in person nor by attorney.

SIXTH: That the defendant Meyer, was not required to seek relief in Wyoming by review of the judgment which was by default rendered against him by the Wyoming Court either by appeal, writ of error or otherwise.

SEVENTH: That the Wyoming Court had no jurisdiction of either the defendant Meyer, or his property which it assumed to impound and which property was at all times located in the State of Colorado and was by no remedial process brought or even attempted to be brought within the jurisdiction of said Court or under its control and said defendant Meyer, was at the date of the institution of said action, for at least seven years prior thereto and to the date of his death on August 17, 1935, in the City and County of Denver, Colorado, a resident of the State of Colorado.

EIGHTH: The judgment of the Wyoming Court is void upon its face for want of jurisdiction of either the defendant Meyer, or his property and there was no cause of action existing to the plaintiff Milliken, upon which to base a judgment.

NINTH: That the attack on this judgment is direct and not collateral though it need not be direct

as the same rule of law does not prevail in an attack upon a foreign judgment or a judgment of a sister state as prevails in connection with an attack upon a domestic judgment.

TENTH: That the judgment of the Wyoming Court under the existing facts is a denial of due process of law.

ELEVENTH: That the judgment and decree of the Wyoming Court contravenes the findings of said Court as set out in Paragraph "Second" of its decree.

TWELFTH: That the judgment and decree of the Wyoming Court violated the mandatory provisions of the Wyoming Statute, being Section 5785 of Wyoming Compiled Statutes of 1920.

THIRTEENTH: That the findings of a Court are not a judgment.

Respectfully submitted,

W. E. CLARK,

Attorney for Plaintiff in Error.

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A-1 STATE OF COLORADO, ss.

IN THE SUPREME COURT THEREOF.

THE PEOPLE OF THE STATE OF COLORADO,

To the District Court of the City and County of Denver and State of Colorado, Greeting:

WHEREAS, lately in the District Court of the City and County of Denver, State aforesaid, in a certain cause therein pending between Violet L. Meyer, both individually, and as Administratrix with the Will annexed of

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the Estate of Raymond D. Meyer, deceased,
A-2 Plaintiff, and William B. Milliken, et al., Defendants, the judgment of said District Court in said cause rendered was against the said plaintiff.

AND WHEREAS, the said cause was brought into our SUPREME COURT OF THE STATE OF COLORADO, by writ of error to said District Court.

AND WHEREAS, at the September Term
A-3 of our Supreme Court, in the year of our Lord one thousand nine hundred and thirty-seven the said cause came on to be heard before our said SUPREME COURT on the 27th day of December, A. D. 1937, (the same being one of the Juridical days of said term) and the following proceedings were had and entered of record in the said cause, to-wit:

"Violet L. Meyer, both individually and as Administratrix of the Estate of Raymond D. Meyer, deceased,
Plaintiff in Error,
A-4 No. 14155
vs.
William B. Milliken, et al.,
Defendants in Error.

Error to the District Court of the City and County of Denver.

This cause having been brought to this Court by Writ of Error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon

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A-5 the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby reversed, annulled and altogether held for naught; and that this cause be remanded to said District Court which is directed to enter judgment in favor of the plaintiff and against W. B. Milliken and Mar-

A-6 garet Milliken, and each of them and the Texas Production Company and the Ohio Oil Company and each of them, for any and all monies shown to have been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved or to be involved in the future.

It is further ordered and adjudged that said plaintiff in error do have and recover of and from said defendants in error her costs in this Court expended, to be taxed.

NOW, THEREFORE, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such further proceedings

A-7 may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein, and the order of Court entered December 1,

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1938, a certified copy of which is hereto attached.

WITNESS the HONORABLE H. P. BURKE, Chief Justice of our Supreme Court and the seal thereof, affixed at my office in the City of Denver, this 2d day of December, A. D. 1938.

(SEAL) A. H. White, Clerk Supreme Court.
By O. E. Rickerson, Deputy.

A-9 Upon plaintiff in error's motion, filed herein, to reform the direction of the opinion heretofore announced by this Court, to the end that interest and costs be included,

IT IS ORDERED that interest on the judgment at legal rate be allowed from the 29th day of October, 1935, the date of the commencement of this action and that costs follow the judgment.

A-10 En Banc.

Denver, Colorado,
December 1, 1938.

Lodged in District Court, City and County of Denver, Colo., Jan. 6, 1939.
F. W. SANBORN, Clerk.

Filed in District Court, City and County of Denver, Colo., Jan. 30, 1939.
F. W. SANBORN, Clerk.

BE IT REMEMBERED, That on Tuesday, the 27th day of December, A. D. 1938, the same being one of the regular juridical days of the September, A. D. 1938 Term of the District Court of the Second Judicial District of the State of Colorado, sitting at Denver, the

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above-entitled cause came on to be heard before the Honorable Robert W. Steele, Judge presiding in Division III of said Court, pursuant to the remittitur of the Supreme Court of the State of Colorado, the plaintiff appearing by W. E. Clark, Esquire, her attorney, the defendants William B. Milliken and Margaret M. Milliken appearing by John G. Reid and Jean S. Breitenstein, Esquires, their Attor-
A-13 neys, Texas Production Company appearing by Yates A. Land, Esquire, its attorney, and The Ohio Oil Company appearing by Harold H. Healy, Esquire, its attorney.

And thereupon the following proceedings were had:

MR. CLARK: May it please the Court, in the copy of the order I left here the other day I found a couple of typographical errors and I had it re-written and, at the same time, fig-
A-14 ured the interest down to date, and I think counsel each have a copy of it.

MR. LAND: We have a copy. I have not given Mr. Healy his copy, but I will give it to him now.

MR. CLARK: It was simply a matter of making a couple of corrections. I now submit to the Court the copy as corrected, of which counsel each have a copy. I have since received through the mail a copy of a draft prepared by counsel on the other side, which includes the judgments over referred to by them, which, of
A-15 course, as I view it, is no part of the order that I am to submit, or that is necessary, to conform to the mandate of the Supreme Court.

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I have certainly no objection to their having any order they desire entered, because of the stipulation had in court, and they are entitled to their form, so far as plaintiff is concerned, but it is my position that it is no part of the judgment order, not having been a matter under consideration by the Supreme Court and in no way referred to in the remittitur, or mandate or direction.

A-16 THE COURT: It can, however, not reflect on the plaintiff's right to recover, can it?

MR. CLARK: In a sense that would be true. On the other hand, as I have drawn my order, I have based it upon and pursuant to the mandate of the Supreme Court, and, of course, anything added to that would not be in conformity with that provision. I observe in the copy which counsel sent me it says: "This matter coming on to be heard pursuant to the remittitur of the Supreme Court of the State of Colorado." Of course, there is no reference
A-17 made to it in the remittitur, so that would not speak the fact. It has been my position all the while that any judgment order they have entered, and it is their privilege to have it in such form as they please, does not concern me but that, simply, it is no part of the matter that was in the Supreme Court.

MR. BREITENSTEIN: If the Court please, I have prepared a form of order and have sumitted copies to Mr. Clark and to Mr.
A-18 Healy. I did not get one to Mr. Land. We object to the form of order which Mr. Clark has submitted, as not clearly deciding the

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issues involved in this case. I draw particular attention to the last paragraph of his order, which reads: "AND IT IS FURTHER ORDERED That the defendants, William B. Milliken and Margaret M. Milliken, be, and they are hereby enjoined from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved and to be involved in the future." I submit
A-19 that no one could pick up that judgment and tell, from reading that paragraph, just what the Millikens are enjoined and restrained from doing. It is even more indefinite and ambiguous than the judgment which Mr. Clark has been complaining about throughout this case. We feel that in this judgment the issues as made up by the pleadings should be clearly settled and defined. As counsel know, we hope to secure a review of the Colorado Supreme Court decision in the United States Supreme Court. For us to do that, it is important, and we feel we are entitled to have the record in such shape that the issues in the case may be clearly presented to the United States Supreme Court. To that end, we feel that the judgment
A-20 which is signed by Your Honor should in some manner show that the bill of exceptions or record made at the trial before Your Honor was considered by Your Honor in the entry of this judgment; that the parties had no further or additional evidence to present, and that the bill of exceptions as made up and settled by Your Honor is the evidence which is before Your Honor at the time of the entry of this

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judgment. We feel, further, that there should be a direct finding by the court, in accordance with the decision of the Colorado Supreme Court, that the Wyoming judgment is null and void. We feel there should be a finding that
A-21 the Millikens should be restrained from in any way interfering with the collection of the proceeds from the interest which is in dispute, and, of course, that the plaintiff, under the Colorado Supreme Court decision, is entitled to a money judgment for the amount which is not in dispute and is a matter on which all parties are in accord. Then, in accordance with the agreement between the Millikens and the two oil companies, provision should be made in the judgment for judgment over. We have a letter from Mr. Healy this morning indicating a
A-22 slight change which he thought should be made in that respect, and we agreee that it should be modified in accordance with his suggestion. We would like to have the record show definitely, if it is true, that the parties have no additional evidence to offer at this time, and that the evidence as presented at the former trial and incorporated in the bill of exceptions, is the evidence and all of the evidence before
A-23 Your Honor at this time. That, very briefly, is our position in the matter.

MR. CLARK: I desire to reply when counsel are through. I do not know what Mr. Healy has to say.

MR. HEALY: If Your Honor please, I might say, in behalf of The Ohio Oil Company, that the form of order submitted by counsel

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for Millikens is entirely satisfactory to The Ohio Oil Company, with the exception of one slight change which is due to my own oversight, because they had incorporated in their form of judgment order exactly the paragraph
A-24 that I previously submitted to them. Then I found I had left something out. In other words, what I wanted to add to the order as drawn by counsel for defendants Milliken was a further provision that, in event that the Millikens should satisfy the judgment, that Texas Production Company should also satisfy and discharge its judgment against The Ohio Oil Company. There is a provision also that in case the Millikens satisfy the judgment, that the two oil companies should then satisfy and discharge the judgment over against Millikens.
A-25 I just wanted additional satisfaction from Texas Production Company of the judgment against The Ohio Oil Company, which I feel, although I have not spoken to Mr. Land, we are entitled to.

MR. LAND: He is entitled to that.

MR. HEALY: Otherwise, the form of judgment submitted by counsel for Millikens is entirely satisfactory and is in accord with what should be entered in this case.

MR. CLARK: Have you anything to say, Mr. Land?

MR. LAND: No sir.

A-26 MR. CLARK: Now, may it please Your Honor, there is no suggestion in this remittitur, or this direction or mandate of the Supreme Court, that any further testimony be

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taken, or that the case is here for disposition of any issue that has not been disposed of. It was not remanded with any instructions or directions to dispose of any undisposed of issue, and therefore does not call for findings from Your Honor. I submit that what the court
A-27 itself has found and determined is a matter of record, and is not to be subjected to further hearing before any person. Counsel made a suggestion with reference to the last paragraph in our form of judgment order. I had the clerk make me a copy of the remittitur, and I will read from it that part with reference to Millikens being enjoined. It says, "and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved or
A-28 to be involved in the future." That is the language in the judgment order I have drawn. I am not assuming to amend that, or correct it, or suggest other wording than is contained there; I am just conforming to what the court has directed, feeling that I have no right to change that language, and feeling that there is no basis for objection by counsel on the other side with that language of the Supreme Court incorporated. Reading again from the remittitur, it says: "Now, Therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such further proceed-
A-29 ings may be had in said cause as shall conform to the judgment of this Court, entered as

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aforesaid, as also with the opinion filed therein, and the order of Court entered December 1, 1938, a certified copy of which is hereto attached." That is the final mandate of the Supreme Court. The judgment of the Court, so far as it entered judgment up there, reads: "It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and
A-30 altogether held for naught; and that this cause be remanded to said District Court which is directed to enter judgment in favor of the plaintiff and against W. B. Milliken and Margaret Milliken, and each of them, and the Texas Production Company and The Ohio Oil Company and each of them, for any and all monies shown to have been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from
A-31 the interest herein involved or to be involved in the future." It seems to me there is no authority anywhere to change the language of the Supreme Court, but simply to follow its directions, which are sufficiently specific.

THE COURT: The form of order presented by the other side only changes it to the extent of reciting that that interest is 1/16th of the net proceeds, does it not?

MR. CLARK: Substantially, that is the only change, but the entire judgment order undertakes to say, and does say, reading from the first line, "This matter coming on to be

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heard pursuant to the remittitur." Now, the
A-32 remittitur has nothing in the world to do with these judgments over.

THE COURT: You have no objection to this Court making a definite order that the judgment of the Wyoming court is void, do you? That was the gist of your suit, was it not?

MR. CLARK: Yes.

THE COURT: Your form of order does not contain a finding to that effect; this other one does.

A-33 MR. CLARK: No, mine does not contain a finding to that effect, for the reason that it was not directed by the Supreme Court, and I did not assume to put anything into it that was not specifically authorized.

THE COURT: I think you are right to some extent, that is, that your form does undoubtedly conform to the remittitur. On the other hand, I can see reasons why the defendants would like to have a judgment in a little fuller form. It does not seem to affect the rights of the plaintiff in any way to put in a
A-34 few things, because with them in it is substantially in conformity with the remittitur. True, this order they have presented does not limit the judgment to the exact language of the Supreme Court, but it certainly is the substance of it. If the defendants think that some of these things would help them in the further appeal of the case, I cannot see how your client is going to be hurt at all. There is a judgment here for money, exactly what you started out

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to get. You are getting it by this judgment order and you are getting it by yours, too. I cannot see that you are prejudiced in the slightest by having a finding put in that the Wyoming judgment is void, a finding for judgment over, and a slight change in the language
A-35 of the injunctive order. I am not entirely familiar with the procedure in appealing cases to the United States Supreme Court. I have never taken a case up there myself, but I understand there are some technical matters involved and the record is scrutinized very carefully, and if I thought this form of judgment was going to hurt you in the slightest, or was going to prevent your client from full recovery in event of affirmance there, I would not do it, but I do not see it has that effect. I take it that is the theory of the defendants in
A-36 presenting this judgment.

MR. BREITENSTEIN: We take the position that our form of judgment more fully protects Mr. Clark's client than his own form. In respect to the injunction part we are really specific; he is general. He could never make a proceeding stand for violation of the order he has in his form, whereas he could under ours. The language of the Supreme Court in the remittitur must be read in accordance with the language in the opinion. We have referred spe-
A-37 cifically to the interest which was involved.

THE COURT: Have you the order which you prepared, Mr. Healy, and which you want to present?

MR. HEALY: It simply adds a few

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words on page 3 of the judgment order as drawn by Messrs. Breitenstein & Reid, at the end of the name "Milfiken" in the sixth line, I think, from the bottom of page 3. Adding these words: "and Texas Production Company shall also satisfy and discharge its judgment herein given against The Ohio Oil Company."

MR. REID: We have no objection to that.

THE COURT: I am inclined to enter the
A-38 order as presented by the defendants with that change, on the theory stated, that plaintiff is fully protected and is recovering everything the Supreme Court stated she should recover.

MR. BREITENSTEIN: We would like to have the record show our exception to the entry of the judgment.

THE COURT: Very well. The judgment order which you have presented will not be entered, Mr. Clark. You have, of course, a
A-39 right to your exceptions.

MR. CLARK: I will ask to have my judgment order marked Exhibit A, and I desire an exception to the Court's refusal to sign the order as presented by me, and an exception to the Court's signing the one presented by the defendants, as conclusively the defendants have no interest in securing the plaintiff her rights but are looking to the interest of their own clients solely, and, in the opinion of counsel for
A-40 plaintiff, there is some ulterior motive that is not at this time apparent, but which will undoubtedly be disclosed when endeavor is made to secure a review in the United States Supreme Court. Conclusively, as previously sug-

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gested, there is nothing in our Supreme Court's remittitur, or remand, or directions, that authorizes the entry, or calls for the entry, of any findings by this court; and the inclusion in the decree of the defendants that there is no further testimony to offer is not properly in that judgment order, because there are no directions for any further hearing or trial, or findings to be made, and that is an unnecessary recital and conclusively for the benefit of
A-41 the defendants, which benefit, however, is not disclosed.

MR. BREITENSTEIN: I understand from Mr. Clark's remarks he is objecting to the entry of the judgment. If Mr. Clark intends to charge us with any improper motive in this judgment, he is certainly wrong. We are attempting to do nothing here but to clearly define the issues and to save to our clients whatever rights they may have to an appeal to the
A-42 highest court in the land, which is something they are entitled to under the law. Mr. Clark knows there is nothing improper in that form of judgment, and his remarks to that end are absolutely uncalled for. We are trying merely to have a judgment entered which clearly defines and settles the issues here. My statement that we intend to go to the United States Supreme Court is certainly not a statement of an ulterior motive. We intend to have nothing in there that would embarrass Mr. Clark in any way, no matter how much he might seek to embarrass us.

A-43 THE COURT: Mr. Breitenstein, what is

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the purpose of the finding that there is no additional evidence to be offered?

MR. BREITENSTEIN: Here is the situation: We have been through cases just like this one before. In fact the injunction suit we had in the other case was just like this one. You have a trial in the district court, the defendant wins, you go to the Supreme Court and the Supreme Court reverses it. Then you try to go to the United States Supreme Court, and you find that they will not take jurisdiction on the ground that no injunction order has been entered, hence no final judgment. You
A-44 can get a review by the United States Supreme Court by certiorari or appeal only from the decision of the highest court of the State. The result is that after the Supreme Court of the United States refuses to take jurisdiction you go back to the Colorado Supreme Court and have them remand the case to the District Court. You then have to start all over again in order to get your case back in the United
A-45 States Supreme Court, and without going through another trial you have to have your record clear in order to go before the United States Supreme Court the second time, or you do not have any record when you get there. That is the reason for it. In the other case which we had we submitted a stipulation to counsel for plaintiff, and my next move is going to be to present that matter to Your Honor. This is what we stipulated: "That the transcript of record heretofore prepared and
A-46 certified by the clerk of the District Court

FOLIO.

shall be taken and considered as a true and correct transcript of the pleadings and proceedings in this cause prior to the issuance of the writ of error by the Supreme Court of Colorado, under which said cause was reviewed by the said Supreme Court, without the necessity of the re-writing and recertification of said transcript." Uuless we get an order like that it will be necessary for us to have the bill of exceptions and the record re-typed and re-submitted to the Colorado Supreme Court so that the Colorado Supreme Court will have
A-47 before it and in its files the record, which we can then use to perfect our application for certiorari.

THE COURT: Do the findings here cover that?

MR. BREITENSTEIN: They do not. The next thing I was going to do was to present that to Your Honor. In the other case we had a stipulation which covered that point. It seems to me it is a distinct advantage to plaintiff to
A-48 stipulate, because in event we are successful—and I know he does not expect us to be—the re-typing of all this would merely add to his costs.

THE COURT: Then there is to be a further order in addition to this one?

MR. BREITENSTEIN: If Mr. Clark does not care to stipulate, then we wish to ask Your Honor for an order that the transcript of record and bill of exceptions in the former trial of this case may be taken and considered
A-49 as a true and correct transcript and bill of ex-

FOLIO

ceptions in this case, without the necessity of re-writing or recertification.

THE COURT: Are you willing to stipulate to that, Mr. Clark?

MR. CLARK: Oh, yes. Certainly that is a correct record.

THE COURT: Then you are willing to stipulate that that is the record now in this case?

MR. CLARK: I do not think I am called upon to do that. Your Honor will have in mind, or possibly you do not know it, that a year ago last October I was stricken with a heart attack, and I was taken home to die, but I did not. I went to California, and I had Mr. Greenwood associate himself with me in the case and he did the principal part of the work that was done when it went to the Supreme Court. I am not a well man yet, and if this goes up again the chances are I will have him associated with me, and I do not want to stipulate on anything that might be objectionable to him, because I
A-51 may have to rely upon him entirely on account of my physical condition.

THE COURT: Could you not incorporate that order in this one, Mr. Breitenstein?

MR. BREITENSTEIN: Yes, we could. The reason we did not was because Mr. Reid and myself had not had an opportunity to discuss that with any of counsel, and for that reason we thought it would be better to leave it out of the crder we prepared and bring it up this morning. It can be very well incorporated in that.

FOLIO

A-52 THE COURT: I do not care, but I thought it could be put under one cover.

MR. BREITENSTEIN: It is merely to protect everybody's rights. We are using the record as made up, and it seems to me that if Mr. Clark was satisfied with it once in the Colorado Supreme Court he should be satisfied with it the second time. We are merely asking that it be taken as the transcript of the record and the bill of exceptions in this cause to save money. That is the only reason for it.

THE COURT: As long as it is to be an order and not a stipulation, it occurs to me it might be incorporated in this one. If it was a
A-53 stipulation, then it would not be in the order, it would be a separate document.

MR. BREITENSTEIN: Do you have any objection to that, gentlemen?

MR. HFALY: No; I will be very glad to stipulate just exactly what you have requested here by way of stipulation.

MR. LAND: Yes, that's alright.

THE COURT: Unless plaintiff joins in the stipulation, it is not a stipulation, and I
A-54 suggest you incorporate that in the judgment order if you want to do it.

MR. BREITENSTEIN: Yes, we would prefer to do it that way.

MR. CLARK: My exception, of course, should be noted to that order as finally entered.

THE COURT: Yes, whatever I sign your objection goes to it and your exception noted.

MR. CLARK: I will ask Your Honor to

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A-55 allow me thirty days for a bill of exceptions in connection with this matter.

MR. BREITENSTEIN: We would like, and we were going to ask, time for bill of exceptions, and also stay of execution. May we have sixty days for bill of exceptions and stay of execution?

THE COURT: Thirty days' stay of execution and sixty days for preparing, tendering and having settled a bill of exceptions on both sides.

MR. CLARK: My bill of exceptions is in reference to our own Supreme Court.

MR. BREITENSTEIN: So is ours.

A-56 THE COURT: Thirty days' stay and sixty days for bill of exceptions for plaintiff and all defendants.

MR. HEALY: May the record show the exception of The Ohio Oil Company and Texas Production Company to the entry of the judgment order in favor of plaintiff?

THE COURT: Yes.

A-57 The above and foregoing is a true, complete and correct transcript of the proceedings had in said cause at the time and place heretofore stated.

DAVID R. WILLIAMS,
Official Reporter.

Plaintiff's form of judgment order tendered to the Court for signature and entry, marked plaintiff's Exhibit A, and the form of judgment order signed by the court and

A-58 entered in this cause are in the words and figures following:

FOLIO

PLAINTIFF'S EXHIBIT A

STATE OF COLORADO
CITY AND COUNTY OF DENVER } ss.

IN THE DISTRICT COURT
No. A-14043
DIV. 3

VIOLET L. MEYER, both individually and as Administratrix with the Will annexed of the Estate of Raymond D. Meyer, deceased.
Plaintiff,

vs.

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,
Defendants,

JUDGMENT ORDER

JUDGMENT ORDER.

Now on this 27th day of December, A. D. 1938, being one of the juridical days in the September Term of this Court, upon motion of plaintiff, by W. E. Clark, her attorney, and in pursuance of the directions contained in the mandate of our Supreme Court, and the order of said Court entered of date December 1, 1938, a certified copy of which order is attached to said mandate;

FOLIO

IT IS ORDERED AND ADJUDGED that plaintiff do have and recover of and from the defendants, William B. Milliken and Margaret M. Milliken, and each of them, and the Texas Production Company and The Ohio Oil Company, and each of them, the sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49), which said sum is the total of monies shown to have been paid the Millikens by virtue of the Wyoming decree, as appears from the opinion of said Supreme Court, in Volume 101 of Colorado Reports, at page 568 thereof, together with interest on said sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49) at the legal rate of six per cent. per annum from the 29th day of October, 1935, which interest is the sum of Nine Hundred Sixteen and 68/100 Dollars ($916.68), and making the sum total of said judgment so rendered and to be entered Five Thousand Seven Hundred Forty-six and 17/100 ($5,746.17), together with the costs by plaintiff incurred herein, both taxed and to be taxed, and let execution issue therefor.

AND IT IS FURTHER ORDERED that the defendants, William B. Milliken and Margaret Milliken, be, and they are hereby enjoined from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved and to be involved in the future.

FOLIO

Done and signed in open Court the date above written.

.....

District Judge.

STATE OF COLORADO,
CITY AND COUNTY OF DENVER } ss.

IN THE DISTRICT COURT.

No. A-14043—Div. 3

VIOLET L. MEYER, both individually and as Administratrix with the Will annexed of the Estate of Raymond D. Meyer, deceased,

A-59

Plaintiff,

vs.

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Defendants.

JUGDMENT ORDER

This matter coming on to be heard pursuant to the remittitur of the Supreme Court of the State of Colorado, the plaintiff appearing by her attorney, W. E. Clark, the defendants William B. Milliken and Margaret M. Milliken appearing by John G. Reid and Jean S. Breitenstein, their attorneys, the defendant Texas Production Company appearing by Yates A. Land, its attorney, and the defendant The

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Ohio Oil Company appearing by Harold H. Healy, its attorney, and it appearing to the Court that none of the parties have additional evidence to be offered and that the evidence
A-61 adduced at a former trial as shown by the Bill of Exceptions contained in the transcript of record of this cause in the Colorado Supreme Court should be held and considered as all of the evidence herein and the Court having examined said evidence and having heard the arguments of counsel and having examined the remittitur of the Supreme Court and being now well and fully advised in the premises doth find that the judgment and decree of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in favor of the defendant W. B. Milliken and against R. D. Meyer, now deceased, is void and of no effect; that the plaintiff is entitled to all of that certain one-sixteenth of the net profits derived, or to be derived, from the oil and gas opera-
A-62 tions covered by and provided for, in that certain agreement entered into between R. D. Meyer and Transcontinental Oil Company and dated August 31, 1922; that the defendants W. B. Milliken and Margaret M. Milliken should be enjoined and restrained from in any way interfering with the rights of the plaintiff therein and thereto and from in any way interfering with the collection by the plaintiff of the proceeds of said interest which have accrued and which may hereafter accrue; and that the plaintiff is entitled to judgment herein
A-63 in accordance with the prayer of her complaint.

FOLIO

IT IS ACCORDINGLY CONSIDERED, ORDERED, ADJUDGED, AND DECREED,

1. That the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being docket No. 2148
A-64 in said Court, is null, void and of no effect.

2. That plaintiff do have and recover of and from the defendants, William B. Milliken and Margaret M. Milliken, and each of them, and Texas Production Company and The Ohio Oil Company, and each of them, the sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49), which said sum is the total moneys shown to have been paid to the said Millikens by virtue of the aforesaid Wyoming judgment, together with interest on said sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,-829.49), at the rate of six per cent. per annum
A-65 from the 29th day of October, 1935, which interst is the sum of Nine Hundred Sixteen and 68/100 Dollars ($916.68), and making the sum total of said judgment so rendered and to be entered Five Thousand Seven Hundred Forty-six and 17/100 Dollars ($5,746.17), together with the costs by plaintiff incurred herein, both taxed and to be taxed, and let execution issue therefor.

3. IT IS FURTHER ORDERED AND
A-66 ADJUDGED, that defendants The Ohio Oil

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Company and Texas Production Company do have and recover the same amount so adjudged against them of and from the defendants William B. Milliken and Margaret M. Milliken and each of them, and that defendant Texas Production Company do have and recover the same amount so adjudged against it of and from the defendant The Ohio Oil Company; provided, however, that in the event the defendants William B. Milliken and Margaret M. Milliken, or either of them pay, satisfy and discharge the judgment rendered against them in favor of plaintiff herein, then and in that
A-67 event defendants The Ohio Oil Company and Texas Production Company shall satisfy and discharge their judgment herein given against said defendants William B. Milliken and Margaret M. Milliken, and Texas Production Company shall also satisfy and discharge its judgment herein given against The Ohio Oil Company, and provided, further, that in the event The Ohio Oil Company shall pay, satisfy and discharge the judgment herein rendered against The Ohio Oil Company, the Texas Production Company shall satisfy and discharge the judgment herein rendered against The Ohio Oil
A-68 Company and in favor of Texas Production Company.

4. IT IS FURTHER ORDERED that the defendants William B. Milliken and Margaret M. Milliken, be, and they hereby are, enjoined and restrained from in any way interfering with the collection by the plaintiff of that certain one-sixteenth (1/16) of the net profits of

FOLIO

the oil and gas operations covered by that certain agreement entered into between R. D. Meyer and Transcontinental Oil Company and dated August 31, 1922.

A-69 It is further ordered that the Clerk of this Court shall forthwith issue a permanent writ of injunction in accordance with this decree.

The Court finds that the filing of a motion for a new trial herein is not necessary, and it is, therefore. ordered that the same be and is hereby dispensed with.

The Court finds that the transcript of record heretofore prepared and certified by the Clerk of this Court is a true and correct transcript of the pleadings and proceedings in

A-70 this cause prior to the issuance of the writ of error by the Supreme Court of Colorado, under which said cause was reviewed by the said Supreme Court, and it is accordingly ordered that such transcript so prepared and certified shall be taken and considered as a true and correct transcript of the pleadings and proceedings in this cause prior to the issuance of said writ of error by the Supreme Court of Colorado, without the necessity of the re-writing or re-certification of said transcript.

A-71 All parties are granted 60 days within which to tender a bill of exceptions. It is ordered that execution be stayed for a period of 30 days from and after this date.

Done in open Court this 27th day of December, A. D. 1938.

(Signed) ROBERT W. STEELE, Judge.

FOLIO

FORASMUCH as the foregoing contains all the proceedings had at the hearing of said cause on December 27, A. D. 1938, the form of Judgment Order tendered by the plaintiff to the Court to be signed and entered herein, and re-
A-72 fused by the Court, the Judgment Order signed and entered by the Court and the exceptions taken and reserved thereto, and inasmuch as the same do not fully appear of record, the plaintiff tenders this, her Bill of Exceptions by her reserved herein, and prays that the Trial Judge may approve, allow, settle, sign and seal the same, pursuant to the statute in
A-73 such case made and provided, and which, when so approved, allowed, settled, signed and sealed may become part of the record herein.

And I, the undersigned Judge of said Court who presided at the hearing of said cause, do hereby approve, allow, settle, sign and seal the same as the plaintiff's Bill of Exceptions in said cause, and do certify that the same is true, correct and complete; and the same is made part of the record herein.

A-47 Done and signed at the City and County of Denver, in said Judicial District and State, this 30th day of January, A. D. 1939.

ROBERT W. STEELE, Judge. (SEAL)

Tendered to me for signature by counsel for plaintiff this 6th day of January, A. D. 1939.

ROBERT W. STEELE, Judge.

APPROVED:

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Counsel for Defendants.

CERTIFICATE OF CLERK.

I, F. W. SANBORN, Clerk of the District Court of the City and County of Denver, Colorado, do hereby certify that the Transcript of the Remittitur from the Supreme Court, appearing in the foregoing Record in Case No. A 14043, in said Court entitled VIOLET L. MEYER, etc. vs. WILLIAM B. MILLIKEN, et al., is true and correct copy as shown by the records in my office.

The cost of the foregoing Record is $2.70.

Witness, F. W. SANBORN, Clerk of said Court, with the seal thereof hereunto affixed at his office in the City and County of Denver, State of Colorado, this 3rd day of February, A. D. 1939.

(SEAL) F. W. SANBORN, Clerk.

CERTIFICATE OF JUDGE.

I, ROBERT W. STEELE, Judge of the District Court of the City and County of Denver, Colorado, do hereby certify that as to all portions of the above and foregoing Record in Case No. A 14043, in said Court, entitled VIOLET L. MEYER, etc. vs. WILLIAM B. MILLIKEN, et al., not covered by the above and foregoing Certificate of said Court, the same are full and complete, true and correct, and the whole consisting of 30 pages, is hereby settled, signed and sealed as the complete Record on Error in said cause.

Witness, ROBERT W. STEELE, Judge of said Court, with the seal thereof hereunto affixed at his office in the City and County of Denver, State of Colorado, this 3rd day of February, A. D. 1939.

(SEAL) ROBERT W. STEELE, Judge.

Filed in the Supreme Court of the State of Colorado. Feb. 8, 1939.

A. H. WHITE, Clerk.

ASSIGNMENTS OF ERROR OF PLAINTIFF IN CASE NO. 14534.

First: The Court erred in refusing to sign the judgment order tendered to it for signature on December 27, 1938, by Plaintiff's attorney, which said judgment order is marked "Plaintiff's Ex. A" and attached to Plaintiff's Bill of Exceptions.

Second: The Court erred in signing the judgment order prepared by Defendants' attorneys for the reason that it does not conform to nor is it in accordance with the remittitur, mandate and directions of this Court, and in particular that such judgment order contains and has made a part of it certain judgments over, which are matters not before this Court for determination and are not mentioned or in anyway refered to in the remittitur, mandate and directions of this Court, but are in fact such judgments as should be entered, if at all, pursuant to stipulation of counsel for the respective defendants, as appears in the abstract of record in this case at Folios 541 to 553, original case No. 14155, under the subject OPENING STATEMENTS; and for the further reason that the judgment order so prepared by the Defendants and signed by the Court, contains certain findings by the trial Court not directed or authorized by the remittitur and mandate of this Court, and further contains certain matters pertaining to the proposed review by the Defendants of the judgment in the United States Supreme Court, which

is not properly any part of a judgment order such as Plaintiff is entitled to under the remittitur, mandate and directions of this Court, which judgment order, beginning at Folio 60 of this Bill of Exceptions, says, "This matter coming on to be heard pursuant to be (the) remittitur of the Supreme Court of the State of Colorado."

W. E. CLARK,
Attorney for Plaintiff.

ASSIGNMENTS OF CROSS ERROR BY DEFENDANTS IN ERROR WILLIAM B. MILLIKEN AND MARGARET M. MILLIKEN IN CASE NO. 14534.

Come now the defendants in error William B. Milliken and Margaret M. Mililken and assign cross error herein and as grounds therefor say that in the trial of this cause the court below committed manifest and material error to the prejudice of these defendants in error in the following respects. viz:

1. The court erred in holding and adjudging that the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company a corporation, and R. D. Meyer, defendants, the same being docket No. 2148 in said court, was null, void and of no effect.

2. The court erred in giving judgment against defendant and each of them in the sum of $5,746.17 and costs.

3. The court erred in enjoining and restraining the defendants William B. Milliken and Margaret M. Milliken from interfering with the collection by the plaintiff of that certain one-sixteenth (1/16) of the net profits of the oil and gas operations covered by that certain agreement entered into between R. D. Meyer and Transcontinental Oil Company and dated August 31, 1922.

4. The action of the court in holding and adjudging that the judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931 in that certain action entitled W. B. Milliken, plain-

tiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being docket No. 2148 in said court, was null, void and of no effect is in violation of Section 1 of Article IV of the Constitution of the United States which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

5. The action of the court in giving judgment against the defendants in the sum of $5,746.17 and costs is in violation of Section 1 of Article IV of the Constitution of the United States for the reason that under the express terms and provisions of that certain judgment entered by the district court of Carbon County, Wyoming, on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being docket No. 2148 in said court the interest in the net profits from oil and gas operations from which said sum is derived was held and adjudged to be the property of defendant William B. Milliken.

6. The action of the court in enjoining and restraining the defendants William B. Milliken and Margaret M. Milliken from interfering with the collection by the plaintiff of that certain one-sixteenth (1/16) of the net profits of the oil and gas operations covered by that certain agreement entered into between R. D. Meyer and Transcontinental Oil Company and dated August 31, 1932 is in violation of Section 1 of Article IV of the Constitution of the United States for the reason that under the express terms and provisions of that certain judgment en-

tered by the district court of Carbon County, Wyoming, on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being docket number 2148 in said court, the said one-sixteenth (1/16) interest was held and adjudged to be the property of the defendant William B. Milliken.

7. The court erred in failing and refusing to give full faith and credit to that certain judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, Plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being docket No. 2148 in said court.

8. The court violated Section 1 of Article IV of the Constitution of the United States by failing and refusing to give full faith and credit to that certain judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being docket No. 2148 in said court.

9. The court erred in finding the issues joined in favor of the plaintiff in error and against the defendants in error.

10. The court erred in entering judgment against the defendants in error William B. Milliken and Margaret M. Milliken.

Wherefore, the defendants in error William B. Milliken and Margaret M. Milliken pray that the judgment be reversed with appropriate directions.

JEAN S. BREITENSTEIN,
JOHN G. REID,
Attorneys for Defendants in Error, William B. Milliken and Margaret M. Milliken.

ASSIGNMENT OF CROSS ERROR BY DEFENDANT IN ERROR THE OHIO OIL COMPANY. IN CASE NO. 14534.

Comes now the defendant in error The Ohio Oil Company and assigns cross error herein and as grounds therefor says that in the trial of this cause the court below committed manifest and material error to the prejudice of this defendant in error in the following respects, viz:

1. The court erred in holding and adjudging that the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being Docket No. 2148 in said court, was null, void and of no effect.

2. The court erred in giving judgment against this defendant in error in the sum of $5,746.17 and costs.

3. The action of the court in holding and adjudging that the judgment of the district court of Carbon County, Wyoming. entered on July 11, 1931 in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being Docket No. 2148 in said court, was null, void and of no effect is in violation of Section 1 of Article IV of the Constitution of the United States which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

4. The action of the court in giving judgment

against this defendant in error in the sum of $5,746.17 and costs is in violation of Section 1 of Article IV of the Constitution of the United States for the reason that under the express terms and provisions of that certain judgment entered by the district court of Carbon County, Wyoming, on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being Docket No. 2148 in said court, the interest in the net profits from oil and gas operations from which said sums is derived was held and adjudged to be the property of William B. Milliken, and Transcontinental Oil Company, predecessor in interest to defendant Texas Production Company and The Ohio Oil Company, was restrained and enjoined from thereafter paying over or in anywise transferring or delivering to R. D. Meyer more than three sixty-fourths (3/64) of said net profits from oil and gas operations.

5. The action of the court in requiring defendant The Ohio Oil Company to pay to plaintiff the sum of $5,746.17 as payment on account of the one sixty-fourth (1/64) of the net profits on oil and gas operations in controversy between R. D. Meyer and William B. Milliken is in violation of Section 1 of Article IV of the Constitution of the United States, for the reason that under the express terms and provisions of that certain Judgment entered by the district court of Carbon County, Wyoming, on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being Docket No. 2148, Transcontinental Oil Company, pred-

ecessor in interest to defendants Texas Production Company and The Ohio Oil Company, was restrained and enjoined from thereafter paying over or in anywise transferring or delivering to R. D. Meyer more than three sixty-fourths (3/64) of said net profits, and the $5,746.17, which said defendant oil companies are required to pay to plaintiff, would result in paying over or transferring or delivering to R. D. Meyer, or his successor in interest, plaintiff herein, more than three sixty-fourths (3/64) of said net profits.

6. The court erred in failing and refusing to give full faith and credit to that certain judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being Docket No. 2148 in said court.

7. The court violated Section 1 of Article IV of the Constitution of the United States by failing and refusing to give full faith and credit to that certain judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being Docket No. 2148 in said court.

8. The court erred in finding the issues joined in favor of the plaintiff in error and against this defendant in error.

9. The court erred in entering judgment against the defendant in error The Ohio Oil Company.

Wherefore, the defendant in error The Ohio Oil Company prays that the judgment be reversed with appropriate directions.

HAROLD H. HEALY,
Attorney for The Ohio Oil Company.

ASSIGNMENTS OF CROSS ERROR BY DEFENDANT IN ERROR TEXAS PRODUCTION, IN CASE NO. 14534.

Comes now the defendant in error Texas Production Company and assigns cross error herein and as grounds therefor says that in the trial of this cause the court below committed manifest and material error to the prejudice of this defendant in error in the following respects, viz:

1. The court erred in holding and adjudging that the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company a corporation, and R. D. Meyer, defendants, the same being Docket No. 2148 in said court, was null, void and of no effect.

2. The court erred in giving judgment against this defendant in error in the sum of $5,746.17 and costs.

3. The action of the court in holding and adjudging that the judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being Docket No. 2148 in said court, was null, void and of no effect is in violation of Section 1 of Article IV of the Constitution of the United States which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

4. The action of the court in giving judgment

against this defendant in error in the sum of $5,-746.17 and costs is in violation of Section 1 of Article IV of the Constitution of the United States for the reason that under the express terms and provisions of that certain judgment entered by the district court of Carbon County, Wyoming, on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being Docket No. 2148 in said court, the interest in the net profits from oil and gas operations from which said sum is derived was held and adjudged to be the property of William B. Milliken, and Transcontinental Oil Company, predecessor in interest to defendants Texas Production Company and The Ohio Oil Company, was restrained and enjoined from thereafter paying over or in anywise transferring or delivering to R. D. Meyer more than three sixty-fourths (3/64) of said net profits from oil and gas operations.

5. The action of the court in requiring defendant Texas Production Company to pay to plaintiff the sum of $5,746.17 as payment on account of the one sixty-fourth (1/64) of the net profits on oil and gas operations in controversy between R. D. Meyer and William B. Milliken is in violation of Section 1 of Article IV of the Constitution of the United States, for the reason that under the express terms and provisions of that certain Judgment entered by the district court of Carbon County, Wyoming, on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being Docket No. 2148, Transcontinental Oil Com-

pany, predecessor in interest to defendants Texas Production Company and The Ohio Oil Company, was restrained and enjoined from thereafter paying over or in anywise transferring or delivering to R. D. Meyer more than three sixty-fourths (3/64) of said net profits, and the $5,746.17, which said defendant oil companies are required to pay to plaintiff, would result in paying over or transferring or delivering to R. D. Meyer, or his successor in interest, plaintiff herein, more than three sixty-fourths (3/64) of said net profits.

6. The court erred in failing and refusing to give full faith and credit to that certain judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being Docket No. 2148 in said court.

7. The court violated Section 1 of Article IV of the Constitution of the United States by failing and refusing to give full faith and credit to that certain judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, vs. Transcontinental Oil Company and R. D. Meyer, defendants, the same being Docket No. 2148 in said court.

8. The court erred in finding the issues joined in favor of the plaintiff in error and against this defendant in error.

9. The court erred in entering judgment against the defendant in error Texas Production Company.

Wherefore, the defendant in error Texas Production Company prays that the judgment be reversed with appropriate directions.

Y. A. LAND,

Attorney for Texas Production Company.

Be It Remembered That upon, to-wit, the 27th day of December, A. D. 1937, an opinion was filed in our Court, which was in words and figures as follows, to wit:

OPINION IN NO. 14,155. EN BANC

Mr. Justice Holland delivered the opinion of the Court.

The parties are before this court in the same order as in the trial court and reference will be made to them as plaintiff or Meyer, and defendants, or the latter will be mentioned by name, as Milliken, Transcontinental Oil Company, the Ohio Oil Company and Texas Production Company.

Prior to August 31, 1922, Meyer, now deceased, then a resident of Wyoming, procured an oil and gas prospecting permit from the United States Government on lands in Moffat county, Colorado, known as the "Hamilton Dome" on which is located the "Moffat Pool." On the above date the Transcontinental Oil Company, by written agreement, contracted by pay him one-sixteenth of the net profit production from oil operations on the lands, and bound the successor and assigns of the company thereby. W. B. Milliken, a defendant, witnessed this agreement. Milliken and his son Carl S. asserted a claim to a two-thirds interest in the one-sixteenth interest contracted to Meyer, but on May 3, 1924, after oil had

been produced from the lands, Milliken contracted with the company for a one thirty-second of the net production, and in this transaction, he and his son, assigned and transferred to the company all their interest and claims of every kind and nature against Meyer, pertaining to any and all lands in Moffat and other counties in Colorado or the one-sixteenth interest of Meyer in the profits therefrom. In February of 1927, Milliken, in an action filed in the district court of Lincoln county, Wyoming, against the Transcontinental Oil Company upon an alleged claim of a thirty-five per cent interest in lands and production of the Transcontinental Oil Company both in Wyoming and Colorado, sought the cancellation of the contract for the one thirty-second interest theretofore entered into on May 3, 1924, alleging fraud on the part of the company. On application of the company, removal of the case was had to the federal court at Cheyenne, Wyoming, and later was dismissed by Milliken without prejudice. In July of 1927, he filed a like action in the district court of Carbon county, Wyoming, against the company and joined Meyer as a defendant, alleging a "joint adventure agreement" between Milliken, Meyer and the Transcontinental Oil Company, and charged defendant Meyer and defendant company with a conspiracy to defraud him. Therein he prayed an accounting from the defendants, and that the contract with the defendant company for a one thirty-second interest be cancelled. Upon service of process in Wyoming, the company appeared and answered. Meyer being served with a copy of summons and complaint in the City and County of Denver, Colorado, March 30, 1928, made no appearance either in person or by attorney. Not

until May 15, 1931, was the case tried to the court upon the issue as made between Milliken and the defendant company. July 11, 1931, the court entered its decree in favor of the defendant company, finding that the contract of May 3, 1924, for payment by the company to Milliken of the one thirty-second of the net profits from the production of oil and gas, and the contract of same date, wherein Milliken and his son Carl S. assigned their claims against Meyer, as heretofore mentioned were valid. The decree recited that the contracts were entered into in good faith and kept by the company; that there was no fraud or conspiracy on its part; and that Milliken had accepted, benefited by, and ratified the *contracts*. The prayer for cancellation of the contract for the one thirty-second interest was denied, the cause dismissed as to the defendant company, "with prejudice" and judgment given the company against Milliken for costs.

What then follows, in the same decree, is the origin of the controversy in the case now before us. After first entering the default of Meyer, who had been served with process in Colorado, the court made a finding against him in favor of Milliken, in the face of its finding that Milliken, by his contracts—found to be valid—had assigned, for a paid and received consideration, his every claim against Meyer including the one sixteenth interest in the net profits from the Transcontinental Oil Company. The court found that Milliken was entitled to one-fourth of the one-sixteenth interest of production that was to be paid to Meyer by the Transcontinental Oil Company under its agreement of August,

1922, and the value of the one-fourth thus decreed was found to be $30,392.88 to the date of the decree, for that amount judgment was entered against Meyer, and the company was enjoined from paying Meyer, and Meyer from receiving, more than three-sixty-fourths of the net profits of the production of the oil. It is pertinent to note here, that there is no *judgment* decreeing the one sixty-fourth interest to Milliken or any other person. Long before Milliken commenced the action in Wyoming, and in June, 1923, the Transcontinental Company had disposed of a one-half interest in the lands in Colorado, the profits from which are here involved, to the Texas Production Company, a defendant in error here, which latter was to drill and develop the lands and assume the obligations of the Transcontinental Oil Company with Meyer. In April, 1931, the Ohio Oil Company, a defendant in error, acquired the remaining interest of the Transcontinental Oil Company in the lands and the production, also agreeing to perform the terms of the Meyer agreement with the Transcontinental Oil Company. The Ohio Company through its attorney, participated in Milliken's Wyoming suit against the Transcontinental Company and Meyer, and after the decree hereinbefore mentioned, it withheld one sixty-fourth of the payments due Meyer under the contract and so continued to withhold same from him until his death, and since, from plaintiff in error individually and as his administratrix. However, March 16, 1935, upon demand of Margaret Milliken, wife of Milliken and assignee of his judgment against Meyer, it paid her $4,355.49, from the monies withheld from Meyer, and made later payments, amounting in all to $4,829.49, and in

so doing acted in behalf of the Texas Production Company as well as for itself. After July 11, 1931, the date of the Wyoming decree, and beginning December 30, 1931, Meyer wrote the following letters to the accountant of the Ohio Oil Company; its reply follows each letter:

"Denver, Colorado
December 30-1931.

"Mr. H. H. Wonder,
The Ohio Oil Company,
Findlay, Ohio.

"Dear Sir:

"Have not yet received statement of the Moffat Pool Colorado operation for the quarter ending September 30-1931.

"Will you kindly forward statement and oblige,

Very truly yours,

R. D. Meyer."

"The Ohio Oil Co.

"Casper, Wyoming,
January 12, 1932.

"Mr. R. D. Meyer,
1114 Logan St.,
Denver, Colorado.

"Dear Sir:

"Your letter of December 30, 1931, addressed to Mr. H. H. Wonder at Findlay, Ohio, has been referred to me for answer.

"Due to certain complications which have arisen by reason of our difficulties in the surrender of certain lands in connection with our Colorado lease Denver 033221-B, which are lands located in the Moffat Pool, Colorado, there will be some delay in sending you your statement.

"Yours truly,

"R. C. Gwilliam,
Attorney."

"Denver, Colorado
May 26, 1932.

"Mr. H. H. Wonder,
Ohio Oil Company,
Findlay, Ohio.

"Dear Sir:

"I have just received statement and check in the amount of $1,077.42 covering a 3/64ths payment of net profits from the Moffat Pool Colorado operation for the quarter ending March 31-1932.

"The statement however does not show that a 1/64th is being withheld by you. In order that my records may be complete for the quarter will you kindly write me a letter stating the exact amount in dollars and cents of the 1/64th withheld.

"Thanking you,

"Yours very truly,

"R. D. Meyer."

"The Ohio Oil Co.

"Findlay, Ohio
June 1, 1932.

"Mr. R. D. Meyer,
1114 Logan Street,
Denver, Colorado.

"Dear Sir:

"In reply to the request contained in your letter of May 26, 1932, wish to advise that we are withholding 1/64th of the net profits from the Moffat Pool, Colorado, operatings for the quarter ending March 31, 1932, which amounts to $359.14.

"Yours very truly,

H. H. Wonder."

"1114 Logan Street,
Denver, Colorado
February 18-1933.

"Mr. H. H. Wonder,
The Ohio Oil Company,
Findlay, Ohio.

"Dear Sir:

"I am just in receipt of statement and check for $1164.17 in connection with the Moffat Pool Colorado operations for the quarter ending December 31-1932.

"In the preparation of this statement, I observe however that no provision has been made for my interest as being a 1/16th from which you are withholding a 1/64th.

"Will you kindly therefore write me a letter covering this feature, advising exact amount of the 1/64th withheld for the quarter and the grand total now witheld for all quarters as of date December 31-1932.

"Thanking you,

"Yours very truly,

R. D. Meyer."

"The Ohio Oil Co.

"Findlay, Ohio
February 21, 1933.

"Mr. R. D. Meyer
1114 Logan Street
Denver, Colorado.

Dear Sir:

"We acknowledge receipt of your letter of February 18, 1933, in which you ask us to advise the amount of the 1/64th interest we are withholding.

"We withheld $388.05 covering this 1/64th interest for the quarter ending December 31, 1932. The total amount withheld as of December 31, 1932 is $2336.90.

"Yours truly,

H. H. Wonder."

"Denver, Colorado,
May 20, 1935.

"Mr. H. H. Wonder,
The Ohio Oil Co.,
Findlay, Ohio.

"Dear Sir:

"I am herewith returning you statement rendered in connection with the Moffat Pool Colorado operations for the quarter ending March 1935.

"Please enter thereon my 1/64th interest in full showing exact amount placed in the Hold a/c for the quarter, all in accordance with the form of statements rendered in the past. Also please advise the balance of the Hold a/c as of December 31, 1934.

"Thanking you,

"Yours very truly,

R. D. Meyer."

"The Ohio Oil Co.

"A. M. Gee
General Counsel
Hal W. Stewart
G. E. McCullough
R. H. Fletcher
Attorneys.

"Findlay, Ohio
May 24, 1935.

"Mr. R. D. Meyer
1114 Logan Street
Denver, Colorado.

"Dear Sir:

"I have before me your letter of May 20, 1935, returning the statement for the first quarter of 1935 concerning operations on lease Denver 033221-a (our 383-a) in the Moffat Pool in Colorado. The situation is being reviewed for the purpose of determining whether or not 1/64th net profits interest should be continued to be held or should be paid to Margaret Milliken as assignee of W. B. Milliken. In order that we may be in better position to determine this matter will you kindly furnish me documentary evidence upon which you base your claim to this 1/64th interest.

"If, upon conclusion of the matter, it appears that the statements to you should properly show the amount involved in this 1/64th, I am returning herewith the statement for the first quarter of 1935 and if any additions are to be made to such statement because of such 1/64th

interest, such additions will be made by a supplementary statement.

"Very truly yours,

"Hal. W. Stewart."

It is disclosed by this correspondence that Meyer was endeavoring to be kept advised concerning the one sixty-fourth interest withheld from him and could be lead to believe that proceeds from said interest were being held by the Ohio Company. The letter from the Ohio Company under date of May 24, 1935, indicates that the company was uncertain as to whether it should hold the proceeds or pay same, on demand, to Margaret Milliken, when in fact, the exhibits in the record show that before that time and on March 16, 1935, it made its first payment to her of over $4,000. Meyer died August 17, 1935, and the above information came to his wife, plaintiff in error, in the latter part of September, 1935, whereupon she immediately instituted in the district court of the City and County of Denver the action, the judgment in which, is now before us for review.

Plaintiff, alleging that she had no plain, speedy or adequate remedy at law, on October 29, 1935, filed her complaint, the allegations of which, briefly summarized, are as follows: The death of Meyer, admission of his will to probate and the authorization of the county court to institute this action; the allegation of the agreement of August 31, 1922, between Meyer and the Transcontinental Oil Company for a one-sixteenth of the net profits from oil production upon the lands for which Meyer agreed to procure prospecting permits to be assigned to the

company, and the extension of the rights of both parties to their heirs and assigns; that the defendants Texas Production Company and the Ohio Oil Company are corporations doing business in Colorado; that Transcontinental Oil Company, about May 19, 1923, sold and assigned to the Texas Production Company an undivided one-half interest in and to the lands described in the contract between Meyer and the company subject to the conditions of the August, 1922, agreement with Meyer, and requiring the Texas Production Company to develop the lands; that the Ohio Company later acquired the remaining interest of the Transcontinental Oil Company in and to the lands covered by its agreement of August 31, 1922, with Meyer; that the Texas Company thereafter reported production to the Ohio Company and the two companies then being joint owners and in control of the lands made reports of the monies Meyer was entitled to receive, all reports showing the retention, since April 1, 1931, of one-fourth of the money to which Meyer was entitled under the contract; the institution of the suit by Milliken in the Wyoming court against the Transcontinental Oil Company and Meyers, alleging fraud and conspiracy on the part of the defendants; allegations to the effect that Meyer was not a resident of Wyoming on March 26, 1928, the date on which process from the Milliken suit in Wyoming was served upon him in the City and County of Denver; that he was not a resident of Wyoming at anytime thereafter nor at any time prior to March 26, 1928 and subsequent to the month of June, 1920, and that at no time after June, 1920, did he live in the state of Wyoming; that he did not remain out of the state or conceal himself to avoid process upon him,

but that in June, 1920, he moved with his family from Wyoming with the intention of becoming, and did become, a resident of Colorado and, until his death, resided with his family at 1114 Logan street, Denver, Colorado; that in March, 1928, Milliken, as plaintiff in the Wyoming suit, caused alias summons to be issued from the district court of Carbon county, Wyoming, which was served upon Meyer in the City and County of Denver; that one of Milliken's attorneys filed in the case an "affidavit for constructive service" alleging Meyer to be a resident of Wyoming, living part time in Denver, and since the filing of the action that he had remained out of the state of Wyoming, concealing himself to avoid service of the summons, and further stating in the affidavit the nature of the action, wherein it was sought to cancel a certain contract entered into between Milliken and the Transcontinental Oil Company which Milliken was induced to make through fraud of the defendants Transcontinental Oil Company and Meyer; setting out the applicable Wyoming statutes relative to constructive service and personal service out of the state; allegation of service of the summons with a copy of the complaint on Meyer in Denver, Colorado; alleging that Meyer at no time entered appearance in the Wyoming court; setting out the answer of the appearing defendant, Transcontinental Oil Company, which put in issue all matters in Milliken's petition, including the allegations of conspiracy and fraud on the part of both defendants; setting out the agreement of May 3, 1924, between Milliken and his son Carl S., and the Transcontinental Oil Company whereby Milliken obtained a one thirty-second interest in and to the net profit production

from the lands involved, and sold and assigned all claims of every nature they had against Meyer or in and to any interest in lands he had which are here involved; setting out the decree of the Wyoming Court, hereinbefore summarized in this opinion; setting out some of the correspondence between Meyer and the Ohio Oil Company; that the judgment of the Wyoming court against Meyer is void because rendered by the court without jurisdiction of the person of Meyer and without jurisdiction of his property which it assumed to impound and because it contravenes its own findings as set forth in the decree; that due process of law was not obtained in the action, contrary to the Constitution of Wyoming; that the pleaded statutes of Wyoming do not purport to, and did not, give the court jurisdiction to render the personal judgment against Meyer and that the statutes which authorized constructive service did not give the court jurisdiction over Meyer or his property which is assumed by the injunctive provision of the decree.

The prayer of the complaint is that the court hold the Wyoming judgment and decree to be a nullity and entirely void for want of jurisdiction, and as counsel now says, inadvertently prayed that the decree of the Wyoming court be vacated; further, that plaintiff have judgment against Milliken and his wife, Margaret M. Milliken, and each of them for the sums paid to them which should have been paid to Meyer under his contract, aggregating $4,829.49, and that the Millikens and all persons claiming under them, be enjoined from attempting to enforce the Wyoming judgment and decree, and

from in any way interfering with the rights of plaintiff as to any and all accrued or future accruing monies represented by the one sixteenth interest of Meyer in the net profits' interest in the production from the lands that have been hereinbefore mentioned.

To this complaint, the defendants Texas Production Company and the Ohio Oil Company filed separate answers and cross-complaints, and defendants Milliken and wife, filed an amended answer, to all of which plaintiff replied. The Texas Production Company, after certain admissions and denials, set up as a defense that the contract between its predecessor in title the Transcontinental Oil Company and Meyer vested in Meyer no interest in the lands, leases thereon, or oil produced therefrom, and that in purchasing an interest in the property the answering defendant did not assume, agree to pay, or agree to otherwise discharge the personal obligation between its predecessor in title and Meyer but acquired such interest subject to the right of Meyer and his successors to participate in the net profits, if any, from said property, and that no contractual relation now or ever existed between defendant and Meyer; that it proceeded upon the assumption that Meyer was legally entitled to look only to the Transcontinental Oil Company and its successor in interest, the Ohio Oil Company; that Meyer with full knowledge had acquiesced in any accounting defendant had made in the matter to the Transcontinental Company; that if Meyer had objected to the failure of defendant to make payments to him, it would not have paid either the Transcontinental Company or

the Ohio Oil Company for the interest claimed by Meyer; that Meyer's action constituted a representation of facts upon his part; that this defendant could and did rely thereon in making the payments otherwise, thereby changing its position to its prejudice if plaintiff is now allowed to recover; that plaintiff is estopped to make claim and demand against defendant. Further answering as a defense and cross-complaint, it alleges that the payments made by it to the Ohio Company were upon the representation that the Ohio Company would pay the same to the parties rightfully and legally entitled thereto, and if such payments were erroneously and improperly made, they were made under a mutual mistake of fact and law; that defendant has demanded of Milliken that the amounts be repaid to it which demand has been refused, and it prays that plaintiff's complaint be dismissed as to it, but in the event plaintiff recover judgment against it, then and in that event, it have judgment over and against the Ohio Oil Company and the Millikens for a like sum.

For answer and cross-complaint, the Ohio Oil Company admits that after it acquired the remaining interest of the Transcontinental Oil Company under the agreement between it and Meyer, that the Texas Production Company and the Ohio Oil Company, became sole owners, but denies that they became joint owners as alleged in plaintiff's complaint and denies that any payments made by it to Meyer after January, 1932, were made "for and on behalf of both of said defendant companies"; admits reporting and remitting to Meyer three sixty-fourths of the net profits from production until March 16,

1935 for the full period after it acquired the remaining interest of the Transcontinental Company; that it retained in a special account one sixty-fourth of the net profits from production; that on March 16, 1935, relying upon the decree of the district court of Carbon county, Wyoming, and upon the demand of the Millikens, it paid Margaret Milliken $4,335.49 and additional quarterly payments to a total of $4,829.49; that in making said payments, it relied upon the fact that Meyer had never made any demand or request for payment to him of any sum represented by the one sixty-fourth interest at any time after the date of the entry of the Wyoming decree, that is July 11, 1931; that during all this period it was accounting to Meyer for three sixty-fourths of the net profits and withholding a one sixty-fourth without objection upon the part of Meyer; that the circumstances required Meyer to speak and inform it of his claim to the one sixty-fourth interest, and in not doing so, he acquiesced in the course of dealing; that had Meyer objected, it would not have paid the money to Margaret M. Milliken upon her request and the payments were made to her in reliance upon the apparent acceptance by and acquiescence of Meyer in, the Wyoming decree; that in making the payments this defendant changed its position to its prejudice, and that Meyer in his lifetime was and plaintiff now is estopped to make or base any claim thereon against it; that by the actions of Meyer, he was guilty of laches and waived any rights to make claim against defendant on account of the payment to Milliken. In cross-complaint against the Millikens, it prays for judgment against them in the amount paid over to them

if the money was wrongfully paid under a mistake of fact.

Plaintiff filed her reply to each of these answers. The pleadings are voluminous, occupying some 541 folios of the record and contain many specific allegations by the way of admissions, denials and defenses which are not herein set out for the reason that they would unduly lengthen this statement, it being deemed sufficient to briefly state the allegations pertinent to a determination of the case.

The issues so made were submitted to the trial court upon the pleadings, evidence, and arguments and statements of counsel. In substance the court found that the Wyoming statutes relative to constructive service are constitutional; that Meyer was legally domiciled in Wyoming at the time of the commencement of the action, at the date of the filing of the affidavit, and at the date of the decree and judgment of the Wyoming court; that the Wyoming court had jurisdiction over the person of Meyer to enter the decree and judgment; that if there is a conflict between the findings and the judgment of the Wyoming court, that matter could and should have been corrected on appeal and such conflict does not render the judgment void on its face; that the judgment is a valid and subsisting judgment and has not been herein successfully impeached; that this action is a collateral attack on the Wyoming judgment and that the issues joined are decided in favor of the defendants and each of them, and against the plaintiff; that there is no equity in the bill and that it should be and is dismissed.

Plaintiff assigns error and contends that the

judgment of the court is erroneous for the following general reasons: That in the Wyoming suit, Meyer was admittedly served with summons in the state of Colorado; that the plaintiff in the Wyoming action had no cause of action against Meyer and it was so determined by the decree in that case; that the alleged cause of action in the Wyoming court was void and nonexistent and was a fraud upon both the court and Meyer; that the finding of the Wyoming court in favor of the Transcontinental Oil Company, a joint defendant with Meyer, and charged with him as a joint tort feasor and the dismissal of the action as to the defendant, Transcontinental Oil Company, operated as a dismissal of the action against Meyer as well; that Meyer was not required to seek relief in Wyoming by a review of the judgment rendered against him; that the Wyoming court had no jurisdiction of Meyer or his Colorado property which it assumed to impound, and which was by no remedial process brought or attempted to be brought within the jurisdiction of the court or under its control; that Meyer was and had been for seven years prior to the institution of the action a resident of Denver, Colorado; that the Wyoming judgment is void on its face for want of jurisdiction of Meyer or his property and no cause of action existed upon which to base the judgment against him; that the attack on the judgment is direct and that the same rule of law does not prevail in an attack upon a foreign judgment as is applicable in connection with attacks upon a domestic judgment; that the Wyoming judgment is, under the facts, a denial of due process of law; that the decree contravenes the findings of the court and violates the

mandatory provisions of section 5785 of the Wyoming Compiled Statutes of 1920; and that the findings of a court are not a judgment.

Defendants in error contend that the finding of the trial court herein to the effect that Meyer was, during all the time incident to the procedure of the Wyoming case, a resident of the state of Wyoming, is a finding of fact upon conflicting evidence and is binding upon this court; that the attack upon the Wyoming judgment is collateral; that the allegations of the complaint and the evidence are insufficient to support the attack; that the Wyoming statutes authorize the judgment of the Wyoming court and that the pleas of estoppel and laches present valid defenses.

So many interesting questions are rarely presented as are disclosed by the record in this case, and we here have an outstanding example of an attempt by each party to rely upon the weakness of the other's cause of action or defense, instead of the strength of his or its position. The authorities tend to support, and we find merit in, both the cause of action and the defenses thereto. Equity therefor requires that the substance of this controversy controls rather than exactness of form. With this in view, we need not concern ourselves with the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter in the case before it, which we do not decide. We content ourselves with a discussion of the effect of the judgment there entered. Concerning the one sixty-fourth interest in the profits of production from the lands involved, it is not disputed that Meyer acquired such interest

through and under the contract of August 31, 1922, between himself and the Transcontinental Oil Company. The only person or persons shown to have ever claimed any part of this interest were Milliken and his son Carl S. It is in no way controverted that on May 3, 1924, the Millikens for a valid consideration, then received and retained by them, sold and assigned, not only this particular interest, but any and all claims of every nature they had against Meyer in connection with all lands here involved or the proceeds from the operations thereon, to the Transcontinental Oil Company. This contract of sale, and the assignment thereunder, was found by the Wyoming court under its decree to be valid. The only suggestion of any basis for an action by Milliken against Meyer, rested upon the claim before its assignment. A study of the Wyoming decree and judgment discloses a full and complete adjudication of Milliken's claim by its finding that he had validly assigned it. This finding deprived the court—and incidentally Milliken—of any basis upon which it could predicate the judgment it later, and by the same decree, entered against Meyer. A judgment must have basis for its existence as a valid judgment. In this connection, it is significant to note that in the Wyoming decree and judgment, there is no judgment against Meyer or in favor of any of the defendants in the action now before us or in any other action shown by the record, for the one sixty-fourth of the net production from the lands involved. It is not disputed that this interest was the property of Meyer in his lifetime and descended to plaintiff in error. It was never transferred by him, or anyone for him, or alienated from him in

any way, or taken from him by the decree or judgment of any court. When the Wyoming court entered a personal judgment against Meyer in favor of Milliken, whom it found had transferred and assigned his every claim against Meyer, it recorded an irreconcilable contradiction of the terms of the finding and decree, and these are so inconsistent as to result in a mere nullity, and particularly the judgment rendered in favor of Milliken and against Meyer. There is no precedent based upon sound legal or equitable principles which will warrant an approval by us of a judgment based upon an alleged cause of action which by judicial ascertainment it is established had been sold and assigned by the plaintiff to another for a valid consideration. Such is the glaring result appearing in the Wyoming judgment upon its face. Our conclusions are not the result of a technical construction of the decree when read and considered as a whole. The decree in no way otherwise gave any intimation that Milliken was entitled to the benefits derived from the thing he had sold. It made no disposition of the one sixty-fourth interest which stands now, as it always stood, for the use and benefit of Meyer and his successors. Of necessity this was as apparent to the Ohio Oil Company as it is to us, because its counsel participated in the Wyoming trial, was familar with the decree and judgment therein entered, and was at all times conversant with the effect of such decree. It cannot now deny its construction of the decree in face of its answer filed herein; notwithstanding, without any right or authority it paid the money here in question to Margaret Milliken out of the one sixty-fourth interest shown to have been still

remaining in Meyer. In its answer herein, the Ohio Oil Company alleged the contract between Milliken and the Transcontinental Oil Company whereby Milliken and his son jointly and severally sold to that company all and singular the rights, interests, claims and demands of every kind or nature which they had against R. D. Meyer in anywise pertaining to any and all lands in Colorado, or the one sixteenth interest of Meyer therein, and that one sixteenth interest included the one sixty-fourth interest now in dispute. It further alleged that the Millikens were estopped thereby to make any claims against it as to the said one sixty-fourth interest; that they were not entitled to any part thereof; that the payments made by it to Margaret Milliken covering the one sixty-fourth interest were made, through a mistake of fact, to the wrong person without any consideration from Margaret Milliken and because of "Forgetfulness" of said agreement of May 3, 1924, when nothing was due or owing Margaret Milliken or William Milliken under any contract; that in equity and good conscience this money should be repaid to it by the Millikens. The Millikens filed no answer to this cross-complaint, and we have no intimation of their position with reference thereto, other than the opening statement of their counsel at the time of trial to the effect that so far as the cross-complaints of the Ohio Oil Company and the Texas Production Company are concerned, counsel was willing to stipulate that one or the other of the oil companies is entitled to a judgment against the Millikens in the event the court should enter judgment in favor of the plaintiff against either of the oil companies. In this equitable action, it is not a

matter of the courts of this state being concerned about the full faith and credit of constitutional provisions relative to judgments of a sister state, the important question being as to the effect of the judgment of a sister state—palpably void on its face—upon the rights of citizens of this state who are parties to the equitable cause of action in this state. A court of this state unquestionably has the power to enjoin the enforcement of such a foreign judgment between the citizens of this state who are before the court and in the state.

The plaintiff herein was, and is, entitled to maintain this equitable action, it appearing that her property rights have been invaded by reason of her being deprived of money due or to become due her by virtue of a judgment which, in so far as it purports to be effective against her, is void on its face because pronounced by a court which had deprived itself of jurisdiction to enter the particular judgment against Meyer. Judgments must conform to the finding of the court in such a substantial particular. *Bartlett v. Hammond*, 76 Colo. 171, 230 Pac. 109. Applying this rule, the judgment of the Wyoming court, in order to comply with the finding of the court by the same decree, would have been one of dismissal of the cause of action against Meyer, because the court already had found that any claim Milliken had ever had or made against Meyer, had been by him sold and assigned to the Transcontinental Oil Company, leaving him without a cause of action against Meyer.

The plea of laches presented by the defendant oil companies here, is without merit. They contend

that Meyer by his conduct led them to believe that he was satisfied with the Wyoming decree. Quite to the contrary is the condition disclosed by the documentary evidence, hereinbefore set out in this opinion. The exhibits, letters from the Ohio Oil Company, are a substantial basis for Meyer to have been led to believe that the money represented by the one sixty-fourth interest here involved was being withheld and retained by the company, and its last letter, written shortly before the death of Meyer and just prior to the institution of this action, of date May 24, 1935, speaks of withholding the money and questions whether or not the company should continue to withhold it or pay it to the defendant Margaret Milliken. Meyer's letters indicate that throughout the period he made inquiry as to the status of the fund retained and the amount being withheld. They negative any suggestion or contention that his silence over that period of time ripened into laches. During this interim, innocent third parties did not become involved, neither did circumstances require the Ohio Oil Company to change its position to its prejudice except as it did do at its peril.

The reliance of the defendant oil companies upon the plea of estoppel is without justification because there is no evidence to support the plea. It is based largely upon the allegation that the oil companies relied upon the decree of the Wyoming court and the fact that Meyer made no demand upon them for payment to him. They do not allege that they would have paid Meyer had such a demand been made, and had they relied upon the Wyoming decree,

it gave them no authority to pay the money to the Millikens upon their demand, and in making such payments they acted at their peril.

The trial court in this case erroneously based its judgment upon the Wyoming decree, as is apparent from its findings to the effect that that decree is valid and binding upon plaintiff. Since the controlling features of the case are presented by the pleadings, and the evidence is largely documentary, this court is in as good a position to pass upon the merits as was the trial court and consequently we are not bound by the trial court's findings.

It is contended that this is a collateral attack upon the Wyoming judgment. Whether it be direct or collateral, the same rules do not obtain as would be applicable in a case in which the attack was upon a domestic judgment. Meyer or his successors are not bound by his failure to seek a review of the judgment of the Wyoming court, which is not a judgment affecting the ownership of the one sixty-fourth interest here involved and which judgment sought to affect and impound property without the jurisdiction of the Wyoming court. By this action, plaintiff is pursuing a remedy available to her at any time an attempt is made to enforce a void judgment. The courts of this state can afford her, its citizen, relief, and will not compel her to resort to a foreign tribunal.

The judgment is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against W. B. Milliken and Margaret Milliken, and each of them, and the Texas Production Company and the Ohio Oil Company and each of

them, for any and all monies shown to have been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved or to be involved in the future.

Mr. Justice Bouck dissenting.

Thereafter, and upon, to-wit, the 27th day of December, A. D. 1937, the following judgment was had and entered of record, to-wit:

JUDGMENT IN NO. 14,155.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause be remanded to said District Court which is directed to enter judgment in favor of plaintiff and against W. B. Milliken and Margaret Milliken, and each of them, and the Texas Production Company and the Ohio Oil Company and each of them, for any and all monies shown to have

been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved or to be involved in the future.

It is further ordered and adjudged that said plaintiff in error do have and recover of and from said defendants in error her costs in this Court expended, to be taxed.

And thereafter and upon, to-wit: the 2nd day of December, A. D. 1938, the Supreme Court of the State of Colorado remanded said cause to the District Court of the City and County of Denver, Colorado and issued its remitittur to said District Court.

And thereafter and upon to-wit: the 27th day of December, A. D. 1938, the District Court of the City and County of Denver entered its final judgment in said cause.

And thereafter and upon, to-wit: the 8th day of February, A. D. 1939, a writ of error was issued by the Supreme Court of the State of Colorado to the District Court of the City and County of Denver, Colorado, in cause No. 14534 in said Supreme Court to review said final judgment of said District Court.

And thereafter, and upon, to-wit, the 13th day of February, A. D. 1940, an opinion was filed in our Court, which was in words and figures as follows, to-wit:

OPINION IN NO. 14,534. EN BANC.

Mr. Justice Bakke delivered the Opinion of the Court.

This case was before us on a former occasion. *Meyer v. Milliken*, 101 Colo. 564, 76 P. (2d) 420. The concluding paragraph of our opinion then announced reads as follows: "The judgment is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against W. B. Milliken and Margaret Milliken, and each of them, and the Texas Production Company and the Ohio Oil Company and each of them, for any and all monies shown to have been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved or to be involved in the future."

Effort was made by defendants in error to have our action reviewed by the Supreme Court of the United States, but certiorari was denied on the ground that, "it does not appear from the record that there is a final judgment." *Milliken v. Meyer*, 305 U. S. 598.

On remand, no further evidence was offered and no changes in the pleadings were made in the district court. Both sides presented a form of judgment, and each objected to the form submitted by the other. The court signed the one tendered by defendants in error, which, omitting the caption, was in the words and figures as follows:

"This matter coming on to be heard pursuant to the remittitur of the Supreme Court of the State of Colorado, the plaintiff appearing by her attorney, W. E. Clark, the defendants William B. Milliken and Margaret M. Milliken appearing by John G. Reid and Jean S. Breitenstein, their attorneys, the defendant Texas Production Company appearing by Yates A. Land, its attorney, and the defendant The Ohio Oil Company appearing by Harold H. Healy, its attorney, and it appearing to the court that none of the parties have additional evidence to be offered and that the evidence adduced at a former trial as shown by the Bill of Exceptions contained in the transcript of record of this cause in the Colorado Supreme Court should be held and considered as all of the evidence herein and the Court having examined said evidence and having heard the arguments of counsel and having examined the remittitur of the Supreme Court and being now well and fully advised in the premises doth find that the judgment and decree of the District Court of Carbon county, Wyoming, entered on July 11, 1931, in favor of the defendant W. B. Milliken and against R. D. Meyer, now deceased, is void and of no effect; that the plaintiff is entitled to all of that certain one-sixteenth of the net profits derived, or to be derived, from the oil and gas operations covered by, and provided for, in that certain agreement entered into between R. D. Meyer and Transcontinental Oil Company and dated August 31, 1922; that the defendants W. B. Milliken and Margaret M. Milliken should be enjoined

and restrained from in any way interfering with the rights of the plaintiff therein and thereto and from in any way interfering with the collection by the plaintiff of the proceeds of said interest which have accrued and which may hereafter accrue; and that the plaintiff is entitled to judgment herein in accordance with the prayer of her complaint.

"It is accordingly considered, ordered, adjudged, and decreed,

"1. That the judgment of the District Court of Carbon county, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff vs. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being docket No. 2148 in said Court, is null, void and of no effect.

"2. That plaintiff do have and recover of and from the defendants, William B. Milliken and Margaret M. Milliken, and each of them, and Texas Production Company and The Ohio Oil Company, and each of them, the sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49), which said sum is the total of moneys shown to have been paid to the said Millikens by virtue of the aforesaid Wyoming judgment, together with interest on said sum of Four Thousand Eight Hundred Twenty-nine and 49/100 Dollars ($4,829.49), at the rate of six per cent. per annum from the 29th day of October, 1935, which interest is the sum of Nine Hundred Sixteen and 68/100 Dollars ($916.68), and making the sum total of said judgment so rendered and to be entered

Five Thousand Seven Hundred Forty-six and 17/100 Dollars ($5,746.17), together with the costs by plaintiff incurred herein, both taxed and to be taxed, and let execution issue therefor.

"3. It is further ordered and adjudged that defendants The Ohio Oil Company and Texas Production Company do have and recover the same amount so adjudged against them of and from the defendants William B. Milliken and Margaret M. Milliken and each of them, and that defendant Texas Production Company do have and recover the same amount so adjudged against it of and from the defendant The Ohio Oil Company; provided, however, that in the event the defendants William B. Milliken and Margaret M. Milliken, or either of them, pay, satisfy and discharge the judgment rendered against them in favor of plaintiff herein, then and in that event defendants The Ohio Oil Company and Texas Production Company shall satisfy and discharge their judgment herein given against said defendants William B. Milliken and Margaret M. Milliken, and Texas Production Company shall also satisfy and discharge its judgment herein given against The Ohio Oil Company, and provided, further, that in the event The Ohio Oil Company shall pay, satisfy and discharge the judgment herein rendered against The Ohio Oil Company, the Texas Production Company shall satisfy and discharge the judgment herein rendered against The Ohio Oil Company and in favor of Texas Production Company.

"4. It is further ordered that the defendants William B. Milliken and Margaret M. Milliken, be, and they hereby are, enjoined and restrained from in any way interfering with the collection by the plaintiff of that certain one-sixteenth (1/16) of the net profits of the oil and gas operations covered by that certain agreement entered into between R. D. Meyer and Transcontinental Oil Company and dated August 31, 1922..

"5. It is further ordered that the Clerk of this Court shall forthwith issue a permanent writ of injunction in accordance with this decree.

"The Court finds that the filing of a motion for a new trial herein is not necessary, and it is, therefore, ordered that the same be and is hereby dispensed with.

"The Court finds that the transcript of record heretofore prepared and certified by the Clerk of this Court is a true and correct transcript of the pleadings and proceedings in this cause prior to the issuance of the writ of error by the Supreme Court of Colorado, under which said cause was reviewed by the said Supreme Court, and it is accordingly ordered that such transcript so prepared and certified shall be taken and considered as a true and correct transcript of the pleadings and proceedings in this cause prior to the issuance of said writ of error by the Supreme Court of Colorado, without the necessity of the re-writing or re-certification of said transcript.

"All parties are granted 60 days within which to tender a bill of exceptions. It is ordered that execution be stayed for a period of 30 days from and after this date.

"Done in open court this 27th day of December, A. D. 1938.

"(Signed) ROBERT W. STEELE,
Judge."

Two assignments of error are directed to the action of the trial court: 1. Its refusal to sign the judgment order tendered by plaintiff in error. 2. Its signing the one prepared by defendants in error, because the latter "does not conform to nor is it in accordance with the remittitur, mandate and direction of this court, and in particular that such judgment order contains and has made a part of it certain judgments over, which are matters not before this court for determination and are not mentioned or in any way referred to in the remittitur, mandate and directions of this court, but are in fact such judgments as should be entered, if at all, pursuant to stipulation of counsel for the respective defendants, as appears in the abstract of record in this case at folios 541 to 553 [original case No. 14155], under the subject Opening Statements; and for the further reason that the judgment order so prepared by the defendants and signed by the court, contains certain findings by the trial court not directed or authorized by the remittitur and mandate of this court, and further contains certain matters pertaining to the proposed review by the defendants of the judgment in the United States Supreme Court, which is not properly any part of a judgment order

such as plaintiff is entitled to under the remittitur, mandate and directions of this court."

1. Our disposition of this second assignment of error renders unnecessary discussion of the first.

2. It should be noted that there is no reference to the Supreme Court of the United States in the judgment, unless the reference to the certification of the record could be so construed, but since counsel admits the correctness of the record we see no reason for this complaint.

As to the complaint concerning judgments over, in favor of the Ohio Company, in paragraph 3 of the decree, plaintiff in error admits it would have been proper if entered "pursuant to stipulation of counsel for the respective defendants." We think the stipulation appearing in the record is sufficient to justify the recitation of the judgment over. It was impossible for the trial court to so decree in the first instance because the ultimate success of the plaintiff in error had not been established. Counsel for both oil companies agreed to the form of the decree signed, although they excepted to its entrance because it was adverse to them.

In our former opinion, reported in 101 Colorado, *supra*, we said, page 580, "Equity therefore requires that the substance of this controversy controls rather than exactness in form." "It is to be observed * * * that when a mandate of a reviewing court is issued to an inferior tribunal, the latter must yield obedience to it, yet it is not to be a blind, but an intelligent obedience." *People v. Carpenter*, 29 Colo. 365, 369, 370, 68 Pac. 221. We conclude that there was a sufficient compliance with the remittitur.

The error, if any there were, is clearly harmless. We should aid in the expedition of litigation where we can do so with justice to all. We believe that to be the result here.

Cross assignments of error may be summarized in the principal point that we failed to give full faith and credit to the Wyoming judgment. Our disposition of that question on the former hearing was: "In this equitable action, it is not a matter of the courts of this state being concerned about the full faith and credit of the constitutional provisions relative to judgments of a sister state, the important question being as to the effect of the judgment of a sister state—palpably void on its face— upon the rights of citizens of this state who are parties to the equitable cause of action in this state. A court of this state unquestionably has the power to enjoin the enforcement of such a foreign judgment between the citizens of this state who are before the court and in the state." 101 Colo., *supra*, page 583. We adhere to that statement, which adherence disposes of the cross assignments.

We deem it only fair, under the circumstances here disclosed that the parties pay their own costs incurred on this writ of error, and it is so ordered.

Otherwise, the judgment is affirmed.

Mr. Justice Otto Bock not participating.

And thereafter and upon, to-wit, the 13th day of February, A. D. 1940, the following judgment was had and entered of record, to-wit:

JUDGMENT IN NO. 14534.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court. It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that the parties pay their own costs.

And thereafter and upon, to-wit, the 26th day of February A. D. 1940, the following Petition for Rehearing was filed in said Court by the defendants in error, viz:

PETITION FOR REHEARING.

Come now the Defendants in Error and respectfully petition the Court for rehearing in the above entitled cause and as grounds therefor state that the Court overlooked and misapprehended the law and the evidence in said case in the following particulars, to-wit:

1. The Court misapprehended the law and acted in violation of Section 1 of Article IV of the Constitution of the United States by failing and refusing to give full faith and credit to the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931 in that certain action entitled W. B. Milliken, Plaintiff, vs. Trans-Continental Oil Company and R. D. Meyer, Defendants, the same being docket No. 2148 in said Court.

2. The Court overlooked the fact that in the aforesaid case the Wyoming Court had jurisdiction of the parties and of the subject matter.

3. The Court overlooked and misapprehended the rule of law that where jurisdiction of an action sufficiently appears the judgment entered therein cannot be impeached or avoided in another state on account of any alleged errors or irregularities committed by the Court which rendered it.

4. The Court overlooked the fact that the defendants William B. Milliken and Margaret M. Milliken, in their amended Answer, pleaded the full faith and credit provision of Section 1, Article IV of the Constitution of the United States as a defense to the action herein and the Court misapprehended the law by not recognizing and sustaining such defense.

Defendants in error further request that in the event this petition for rehearing be denied the opinion of the Court be modified by striking from the last sentence of said opinion the word "otherwise." The effect and intent of the said opinion is to affirm in all respects the judgment of the trial Court. The use of the word "otherwise" is, therefore, inaccurate.

Wherefore, the Defendants in Error pray that a rehearing be granted.

Respectfully submitted,

JEAN S. BREITENSTEIN,
JOHN G. REID,
Attorneys for Defendants in Error William B. Milliken and Margaret M. Milliken;
HAROLD H. HEALY,
Attorney for Defendant in Error The Ohio Oil Company, a Corporation;
Y. A. LAND,
Attorney for Defendant in Error Texas Production Company, a Corporation.

And thereafter and upon, to-wit, the 4th day of March, A. D. 1940, the following proceedings were had and entered of record.

ORDER DENYING PETITION FOR REHEARING IN NO. 14534.

The Court having considered the petition for a rehearing of this cause, and now being well and fully advised in the premises, doth order that said petition be, and the same is hereby, denied.

And thereafter and upon, to-wit, the 4th day of March A. D. 1940, the following Motion was filed in said Court by the defendants in error, viz:

No. 14534.

MOTION FOR A STAY OF EXECUTION PENDING PETITION TO SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI.

Come now the defendants in error above named and ask that the execution and enforcement of the judgment herein be stayed to enable the defendants in error to apply for and to obtain a writ of certiorari from the Supreme Court. In support of this motion defendants in error say that on December 27, 1938 the District Court of the City and County of Denver entered judgment against the defendants in error in favor of the plaintiff in error in the sum of $5746.17 together with costs of the plaintiff. Said judgment was affirmed by this Court on February 13, 1940, and the petition of the defendants in error for rehearing was denied by this Court on March 4, 1940. The defendants in error assert that such judgment now affirmed by this Court denied to them a right claimed by them under the Constitution of the United States, to-wit: the right to have a judgment of the District Court of Carbon County, Wyoming, given full faith and credit by the Courts of the State of Colorado as required by Section 1, Article IV of the Constitution of the United States. The defendants in error intend to and will apply to the Supreme Court of the United States for a writ of certiorari in conformity with the provisions of Section 237 of the United States Judicial Code (28 USCA 344).

In order that the rights of the defendants in error may be protected it is respectfully requested

that this Court stay the issuance of its remittitur herein and that pursuant to the authority granted by the Act of February 13, 1925 (43 Stat. 940, 28 USCA 350) the execution and enforcement of the judgment herein be stayed for a reasonable time to enable the defendants in error to apply for and obtain a writ of certiorari from the Supreme Court of the United States and that such order for security be made as may be proper.

JEAN S. BREITENSTEIN,
JOHN G. REID,
Attorneys for Defendants in Error William B. Milliken and Margaret M. Milliken.
HAROLD H. HEALY,
Attorney for Defendant in Error The Ohio Oil Company, a Corporation.
Y. A. LAND,
Attorney for Defendant in Error Texas Production Company, a Corporation.

And thereafter and upon, to-wit, the 7th day of March, A. D. 1940, the following proceedings were had and entered of record:

No. 14534.

ORDER FOR STAY OF EXECUTION.

This matter comes on to be heard upon the application of the defendants in error for a stay of execution pending the application of the defendants in error for review of this cause in the Supreme Court of the United States on writ of certiorari.

It is ordered that execution and enforcement of the judgment of this Court entered herein on February 13, 1940, affirming the judgment of the District Court of the City and County of Denver in its cause No. A-14043, Div. 3, be, and the same hereby is, stayed for a period of three months from and after the entry of such judgment to enable the defendants in error to apply to the Supreme Court of the United States for a writ of certiorari, and in the event said defendants in error have within said time made such application, then execution shall be further stayed until the final determination of said cause on certiorari by the United States Supreme Court, or until such further order be entered herein with reference thereto, upon the filing within fifteen days from the date hereof by the defendants in error of a good and sufficient bond to be approved by the Chief Justice of this Court in the amount of $1,000.00, conditioned that if the said defendants in error fail to make application for such writ within the period allotted therefor or fail to obtain an order granting their application or fail to make their plea good in the Supreme Court of the United States, they shall answer for all damages and costs which the plaintiff in error above named may sustain by reason of the stay.

It is further ordered that the Clerk of this Court shall forthwith transmit to the Clerk of the District Court of the City and County of Denver a certified copy of this order.

Done at Denver, Colorado, this 7th day of March, A. D. 1940.

BENJAMIN C. HILLIARD,
Chief Justice of the Supreme Court of Colorado.

And thereafter and upon, to-wit, the 18th day of March, A. D. 1940, the following Praecipe was filed in said Court by the defendants in error, viz:

No. 14534.

PRAECIPE.

Come now the defendants in error above named and request the Clerk of the Court to prepare and certify to the Clerk of the Supreme Court of the United States, for use by the defendants in error in making an application to the Supreme Court of the United States for writ of certiorari to review the judgment of the Colorado Supreme Court, ten authenticated and certified copies of the printed record in this cause including therein the following:

1. The supplemental abstract of record filed by the defendants in error in cause No. 14534 which includes everything set out in the abstract of record in cause No. 14155; the assignments of error in cause No. 14155; the supplemental abstract of record in cause No. 14155; the abstract of record in cause No. 14534, the assignments of error in cause No. 14534; and the assignments of cross error in cause No. 14534.

2. The opinion of the Court in cause No. 14155.

3. The judgment of the Court in cause No. 14155.

4. The opinion of the Court in cause No. 14534.
5. The judgment in cause No. 14534.
6. The petition for rehearing in cause No. 14534.
7. The order denying the rehearing in cause No. 14534.
8. Motion for stay of execution.
9. Order for stay of execution.
10. This praecipe with proof of service.

Defendants in error further request that the printed records containing the above mentioned matters be authenticated by the Clerk of this Court and certified (as true and complete copy of the supplemental abstract of the record) and of the proceedings in this cause indicated above.

Dated at Denver, Colorado, this 15th day of March, A. D. 1940.

JEAN S. BREITENSTEIN,
JOHN G. REID,
Attorneys for Defendants in Error William B. Milliken and Margaret M. Milliken.
HAROLD H. HEALY,
Attorney for Defendant in Error The Ohio Oil Company.
Y. A. LAND,
Attorney for Defendant in Error Texas Production Company.

Received a copy of the above and foregoing Praecipe this 16th day of March, A. D. 1940, at Denver, Colorado.

W. E. CLARK,
Attorney for Plaintiff in Error.

THE SUPREME COURT OF THE STATE OF COLORADO.

I, A. H. White, Clerk of the Supreme Court of the State of Colorado, do hereby certify that the foregoing contains a full, true and complete copy of the abstract of record in cause No. 14155 in said court and of the abstract of record in cause No. 14534 in said court, and is a full, true, and complete copy of the record in both causes No. 14155 and 14534 as printed for use in the Supreme Court of the State of Colorado, together with the assignments of error, the assignments of cross error, certain pleadings, record entries and proceedings indicated, including the opinions and judgments of the court, in causes No. 14155 and 14534 (except full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States) had and filed in certain causes in said Supreme Court of the State of Colorado numbered 14155 and 14534 wherein Violet L. Meyer, both individually and as administratrix with the will annexed of the Estate of Raymond D. Meyer, deceased, was the plaintiff in error and William B. Milliken, Margaret M. Milliken, Texas Production Company, a corporation, and The Ohio Oil Company, a corporation, were the defendants in error, as appears from the originals of the same, which remain on file and of record in my office.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the Supreme Court of the

State of Colorado at my office in Denver, Colorado, this fifth day of April, A. D. 1940.

(SEAL) A. H. WHITE,
Clerk of the Supreme Court of the State of Colorado.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 3, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
MAY 8 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1940

No. [redacted] 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

AND

BRIEF IN SUPPORT THEREOF.

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Attorney for Petitioner Texas Production Company.

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Restatement of the Law of Conflict of Laws, Sections 77, 79 .....7, 23

IN THE

Supreme Court of the United States

October Term 1940

No.

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY. a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners seek a review of a final judgment of the Colorado Supreme Court holding void a Wyoming judgment and contend that they have been deprived of the right, existing under Section 1, Article IV of the United States Constitution, to have the Wyoming judgment given full faith and credit by the Colorado courts.

The Wyoming judgment is in personam and was rendered upon the personal service of process in Colorado upon an individual domiciled in Wyoming. The Colorado Supreme

Court held the judgment void, not because of lack of jurisdiction over the person of the defendant, but because of an alleged conflict between the findings of the Wyoming court and its judgment.

STATEMENT OF FACTS.

This action was brought by respondent Violet L. Meyer in the district court of the City and County of Denver, Colorado, to obtain equitable relief from a judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, against respondent's intestate, R. D. Meyer, in an action wherein W. B. Milliken was plaintiff and Transcontinental Oil Company and R. D. Meyer were defendants. The complaint asserts (R. 55) that the Wyoming judgment is void because of a lack of jurisdiction over the person of the defendant R. D. Meyer, who allegedly was a resident of Colorado and was served in that state, and because of an alleged conflict between the findings of the court and the judgment in that the court found valid an agreement between W. B. Milliken and Transcontinental Oil Company whereby Milliken assigned to the Transcontinental company his claim against Meyer and after such finding the court gave judgment in favor of Milliken and against Meyer on the assigned claim.

In their answers the petitioners allege that the Wyoming court had jurisdiction over Meyer because he was domiciled in Wyoming (R. 103) and under applicable and constitutional Wyoming statutes was personally served with process in Colorado (R. 104-105). It is further asserted that the Wyoming judgment is not void because of irregularities or inconsistencies and under Section 1, Article IV of the United States Constitution it must be given full faith and credit in the Colorado court (R. 109).

The Wyoming action was brought by W. B. Milliken against Transcontinental Oil Company and R. D. Meyer upon

the theory that the parties were joint adventurers in certain oil land operations and that the defendants had not accounted to the plaintiff (R. 7). The Transcontinental Company filed its answer (R. 16). Upon the affidavit of Milliken's attorney that Meyer was a resident of Wyoming and concealed himself to avoid the service of process (R. 9), summons was personally served upon Meyer in Denver (R. 15), Colorado. in accordance (R. 10, 14) with the provisions of Sections 5636 and 5641 of the 1920 Wyoming Compiled statutes (Wyoming 1931 R. S., 89-817, 89-822). Meyer, upon advice of counsel, did not appear (R. 54). After trial the Wyoming court found in favor of Transcontinental Oil Company and, after entry of the default of Meyer. found that he and Milliken were joint adventurers who should share equally in the profits of the oil land operations (R. 32-39). The court further found that Meyer had received 4/64ths of such profits and Milliken had received 2/64ths. Judgment was entered against Meyer in the sum of $30,392.88.

The petitioners The Ohio Oil Company and Texas Production Company have succeeded to the interest of the Transcontinental Oil Company (R. 5-6). W. B. Milliken has assigned his rights in the Wyoming judgment to the petitioner Margaret M. Milliken (R. 120). R. D. Meyer died on August 17, 1935, and the respondent Violet L. Meyer was, by the probate court of the City and County of Denver, Colorado, appointed administratrix with the will annexed of his estate (R. 3).

In the first trial of this cause the Colorado district court found for the petitioners and dismissed the complaint (R. 140-143). Upon review by writ of error in the Colorado Supreme Court such judgment was reversed upon the ground that the Wyoming judgment was void because of a conflict between the findings of the Wyoming court and its judgment (R. 237).

A petition for certiorari was denied by this court on

October 10, 1938, upon the ground that there was no final judgment (*Milliken, et al., vs Meyer, etc.*, 305 U. S. 598, 59 S. Ct. 63).

Upon remand to the Colorado district court no new evidence was introduced and no change was made in the pleadings. The district court refused to enter the judgment presented by respondent (R. 181) but did enter judgment pursuant to the remittitur of the Colorado Supreme Court declaring the Wyoming judgment null and void and giving judgment against the petitioners herein in the sum of $5,746.17 representing proceeds from the 1/64th interest paid to the Millikens by the oil companies after the entry of the Wyoming judgment (R. 190-195).

Respondent Meyer then sued out a writ of error in the Colorado Supreme Court contending that the district court erred in refusing to enter the form of judgment which she submitted (R. 197). The petitioners assigned cross error asserting that the court erred in failing to give full faith and credit to the Wyoming judgment as required by Section 1, Article IV of the Constitution of the United States (R. 199-210).

The Colorado Supreme Court on February 13, 1940, affirmed the judgment of the district court (R. 247). A timely petition for rehearing presented by the Millikens and the oil companies was denied on March 4, 1940 (R. 249).

JURISDICTION.

The petitioners say that the Supreme Court of the United States has jurisdiction to review this cause on certiorari because:

1. This petition for certiorari is filed under the provisions of the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937, Judicial Code, Section 237, 28 USCA 344 b), wherein it is provided that it shall be competent for the

Supreme Court by certiorari to review a final judgment of the highest court of a state where any title, right, privilege or immunity is expressly set up or claimed by either party under the constitution. In this cause the petitioners have asserted the right under the Constitution of the United States to have the Wyoming judgment given full faith and credit by the courts of Colorado.

2. The questions involved are substantial because the Colorado courts have held void and enjoined the enforcement of a Wyoming judgment for $30,392.88 upon the sole ground that alleged inconsistencies and irregularities in that judgment rendered it void on its face and thus have denied to the petitioners a substantial right under the Constitution of the United States. The Wyoming judgment was entered by a court which had jurisdiction of the parties and the subject matter. Mere irregularities or inconsistencies which could have been corrected on appeal do not make such judgment void on its face.

3. The federal question was first raised by the petitioners William B. Milliken and Margaret M. Milliken in their amended answer wherein they pleaded (R. 109) that the Wyoming judgment is entitled to full faith and credit in Colorado by virtue of Section 1, Article IV of the Constitution of the United States. The federal question was first raised by the petitioners The Ohio Oil Company and Texas Production Company by their assignments of cross error in the Colorado Supreme Court (R. 203, 207). The Colorado Supreme Court denied the claim of the petitioners that the Wyoming judgment was entitled to full faith and credit by determining that the said judgment was void on its face, not because of any lack of jurisdiction over the parties or subject matter, but because of alleged irregularities and inconsistencies in that judgment.

4. Final judgment in this case was entered by the Colo-

rado Supreme Court on February 13, 1940. Rehearing was denied on March 4, 1940.

QUESTIONS PRESENTED.

1. May the Colorado courts refuse to give full faith and credit to a Wyoming judgment because of certain alleged errors and mistakes of law committed by the Wyoming court?

2. Did the Wyoming court have jurisdiction to render a judgment in personam upon the service of process in Denver, Colorado, on a defendant whose domicile was in the state of Wyoming?

REASONS RELIED ON FOR ALLOWANCE FOR WRIT OF CERTIORARI.

The reasons relied on for the allowance of this writ of certiorari are as follows:

1. By denying full faith and credit to the Wyoming judgment the Colorado court has denied to the petitioners their right under Section 1, Article IV of the United States Constitution to have such judgment given full faith and credit.

Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142.
Titus v. Wallick, 306 U. S. 282, 59 S. Ct. 557.

2. The decision of the Colorado Supreme Court that the Wyoming judgment was void because of irregularities and mistakes of law is not in accord with applicable decisions of this Court holding that irregularities or mistakes of law which could have been corrected upon appeal do not justify the courts of one state in refusing to give full faith and credit to a judgment of the courts of another state.

Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641.
Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602.

3. A judgment in personam may be given by a Wyo-

ming court upon personal service of process outside of the state on a resident of Wyoming who has concealed himself to avoid the service of process.

McDonald v. Mabee, 243 U. S. 90, 37 S. Ct. 343.
Wuchter v. Pizzutti, 276 U. S. 13, 48 S. Ct. 259.
Restatement of The Law of Conflict of Laws, Sections 77, 79.

Wherefore, because of the importance of the questions involved and for the reasons hereinabove set forth your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Colorado commanding said court to secure and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the court in the case of your petitioners which was therein entitled Violet L. Meyer, both individually and as administratrix with the will annexed of the estate of Raymond D. Meyer, deceased, plaintiff in error, vs. William B. Milliken, Margaret M. Milliken, Texas Production Company, a corporation, and The Ohio Oil Company, a corporation, defendants in error, No. 14534, to the end that said cause may be reviewed and determined by this Court as provided by Section 237 of the Judicial Code as amended by the Act of February 13, 1925, and the rules of this Court and that your petitioners may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the provi-

sions of said Code and the rules of this Court and that the judgment of the Supreme Court of Colorado be reversed.

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JOHN G. REID,
Attorneys for Petitioners William B. Milliken and Margaret M. Milliken.

HAROLD H. HEALY,
Attorney for Petitioner The Ohio Oil Company.

Y. A. LAND,
Attorney for Petitioner Texas Production Company.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF COURT BELOW.

The first opinion of the Colorado Supreme Court is reported under the style of *Meyer v. Milliken, et al.*, 101 Colo. 564, 76 P. (2d) 420 (See also R. 211-237). The second and last opinion of that court in this cause has not as yet been officially reported but may be found at pages 239-246 of the record and in the Pacific Reporter advance sheets for April 12, 1940, at page 151 (100 P. (2d) 151).

JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code (28 USCA 344 b.). The petitioners claim that they have been deprived of the right existing under Section 1, Article IV Constitution of the United States to have a valid and subsisting Wyoming judgment given full faith and credit by the Colorado courts.

The asserted federal right has been denied and the sufficiency of the grounds of denial are for this Court to decide (*Titus v. Wallick*, 306 U. S. 282, 291, 59 S. Ct. 557, 562; *Huntington v. Attrill*, 146 U. S. 657, 684, 13 S. Ct. 224, 234; *American Express Company v. Mullins*, 212 U. S. 311, 313, 29 S. Ct. 381, 382; *West Side Belt Railroad Company v. Pittsburgh Construction Company*, 219 U. S. 92, 99, 31 S. Ct. 196, 198).

STATEMENT OF FACTS.

This action was brought by respondent against the petitioners to secure relief from a judgment of the district court of Carbon County, Wyoming, upon the ground that the Wyoming judgment is void because of lack of jurisdiction over the judgment debtor (respondent's intestate) and because the judgment is contrary to the findings of the court.

Consideration must be first given to the Wyoming judgment. Petitioner W. B. Milliken brought suit in the district

court of Carbon County, Wyoming, on July 6, 1927 (R. 6) against R. D. Meyer, and Transcontinental Oil Company alleging conspiracy and fraud to deprive him of his rights under a joint adventure agreement relating to certain oil lands (R. 7). The Transcontinental Company filed its answer (R. 16). Defendant Meyer was personally served with summons in Denver, Colorado, on March 30, 1928 (R. 14-15).

The applicable Wyoming statutes (now Wyoming R. S. 1931, Sections 89-817, 89-822) provide (R. 11-14):

> Sec. 5636, Wyoming Compiled Statutes, 1920—"Service by Publication."
>
> "Service by publication may be had in either of the following cases:
>
> * * *
>
> 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."
>
> Sec. 5641, Wyoming Compiled Statutes, 1920—Personal Service Out of State.
>
> "In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

C. R. Ellery, attorney for Milliken, filed in the case his "Affidavit for Constructive Service" (R. 9) stating that Meyer was a resident of Wyoming, living a part of the time

in Denver, Colorado, and a part of the time at Fort Steele, Carbon County, Wyoming, although defendant as aforesaid was and for many years had been a resident of said Fort Steele, Carbon County, Wyoming, and that since the filing of the action (R. 9):

> " * * * said defendant has remained out of the state of Wyoming, and now conceals himself to avoid summons issued out of the above named court in this cause, and since the filing of this suit, said defendant has and he does now so conceal himself that such process cannot be served upon him."

Meyer, upon the advice of his attorney (R. 54), made no appearance in the case. However he testified as a witness since his deposition was taken by the plaintiff (R. 137-138).

The default of Meyer was entered and, after trial of the case without a jury, the court, in a decree dated July 11, 1931 (R. 32), specifically found that there was no joint adventure agreement between Milliken and the Transcontinental Company; that certain agreements dated May 3, 1924, executed by Milliken and the Transcontinental Company were valid and had been performed by the Transcontinental Company; that the action should be dismissed with prejudice against the Transcontinental Company; that the action of the court under the default of Meyer was (R. 34) "without prejudice to the findings and judgment in favor of said defendant corporation;" and that "as between the plaintiff, W. B. Milliken, and the defendant, R. D. Meyer, the court finds generally in favor of the plaintiff and against the defendant" (R. 34). The court then proceeded to find that there was a joint adventure agreement between Milliken and Meyer in which each (R. 35) "was entitled to share equally in any money, profits, oil and/or gas rights and interests, or other real or personal property" derived therefrom, that the Transcontinental Company had by written agreement under-

taken to pay Meyer a 1/16th part of the net profits and Milliken a 1/32nd part of the net profits from the oil and gas operations on the land covered by the joint adventure agreement; that in the total of 6/64th of the net profits to be paid by the Transcontinental Company Meyer and Milliken should share equally, *i. e.*, each should have 3/64th (R. 36); that Meyer had actually received 4/64ths and had failed to account to Milliken for his 1/64th (R. 36); that said 1/64th with interest amounted to $30,392.88 (R. 37). Judgment was then rendered against Meyer and in favor of Milliken in the amount of $30,392.88 with interest, and Meyer was restrained from receiving, and the Transcontinental Company was enjoined from paying to Meyer, more than 3/64th of the net profits (R. 38). The judgment was approved as to form by the attorneys for the Transcontinental Oil Company (R. 39).

The petitioners The Ohio Oil Company and Texas Production Company succeeded to the rights and obligations of Transcontinental Oil Company (R. 4, 39)). Milliken assigned his entire interest in the judgment to his wife, the petitioner Margaret M. Milliken (R. 121). By August 15, 1935, The Ohio Oil Company paid to Margaret M. Milliken a total of $4,829.49 on account of the 1/64th interest adjudged by the Wyoming Court to be the property of her assignor (R. 122-123).

R. D. Meyer was at all times fully informed of the entry of the Wyoming judgment of July 11, 1931, and of the fact that The Ohio Oil Company was withholding from him the 1/64th of the net profits referred to therein (R. 98).

After the death of R. D. Meyer on August 17, 1935, the respondent was appointed administratrix with the will annexed of his estate by the probate court of the City and County of Denver, Colorado, and under a permissive order of said probate court brought the instant action (R. 3).

The pleadings set out the facts as alleged above. The

complaint alleges that the Wyoming judgment is void because "rendered by said Court without jurisdiction of the person of said deceased" and because it "does not even follow nor conform to, but contravenes the findings of the Court as set forth in said decree" (R. 55) and that the said judgment violates Sec. 6, Art. I of the Wyoming Constitution and the Fifth and Fourteenth Amendments of the United States Constitution by taking property without due process (R. 55-56).

The answer of the Millikens alleges that the Wyoming judgment is entitled to full faith and credit under the Federal Con titution and that a refusal of such full faith and credit "would constitute a violation of said Article IV, Section 1 of the Constitution of the United States, and the rights of these defendants, and each of them, thereunder" (R. 109).

Upon trial to the court without a jury certain facts were adduced from the pleadings and the evidence in addition to those heretofore mentioned.

H. N. Woodman, a shorthand reporter, testified that he took the oral deposition of R. D. Meyer pursuant to a dedimus issued on January 28, 1931, in a case pending in Carbon County, Wyoming, wherein W. B. Milliken was plaintiff and Transcontinental Oil Company and R. D. Meyer were the defendants and that in response to a question as to whether he held his legal residence in Wyoming, Meyer stated (R. 138):

> "Well, of course, that is a question that I am not qualified to properly elucidate. I can only say, for your information, that I am a taxpayer in Carbon County, Wyoming, and that I have always had a feeling that some day I might return there and re-establish my association in Wyoming. In fact I have never voted in Denver."

Chap. 62, Session Laws of Wyoming, 1921, provides that

in connection with oil and gas prospector's leases preference shall be given (R. 139) "to persons who are resident citizens and taxpayers of the state * * * "

The Deputy Commissioner of Public Lands for Wyoming identified certain applications pertaining to Wyoming lands and addressed to the Commissioner of Public Lands for the State of Wyoming. These applications, as defendants' exhibits 2 to 13 inclusive, were admitted in evidence (R. 139-140, 164-165). Exhibits 5, 6, 7, and 8 are each an application for a prospector's lease and are severally dated April 6, 1927, March 16, 1928, and April 1, 1929. Each is made by R. D. Meyer, Trustee, is signed by R. D. Meyer, Trustee and contains the statement (R. 140, 164-165):

> "I am a resident of the State of Wyoming. I am a voter and taxpayer in Carbon County, Wyoming."

Exhibit 10 is a similar application dated March 17, 1930, and contains the following (R. 140, 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 40 years."

Likewise Exhibit 11, dated April 4, 1931, contains this statement (R. 140, 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 30 years."

A similar application is Exhibit 12 which is dated April 9, 1932, and says (R. 140, 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 20 years."

On May 3, 1924, two agreements were executed by W. B. Milliken and Transcontinental Oil Company. One provided for the receipt by Milliken of 1/32nd of the net production from the Hamilton Structure (part of the oil lands covered by the joint adventure agreement between Milliken and Meyer) (R. 17, 25-26). The other was an assignment by

W. B. Milliken and Carl S. Milliken to Transcontinental Oil Company of "all and singular, their right, interest, claim and demand, of every kind or nature, as against the said R. D. Meyer in any wise pertaining to" the lands covered by the joint adventure agreement provided however that Transcontinental should not compromise or settle any such claims with Meyer without securing a full release of all claims held by Meyer against Milliken and that the Millikens could interpose the assigned claims as a defense to any claim asserted against them by Meyer (R. 27-28).

The Colorado District Court found that the Wyoming statutes relating to constructive service were applicable and constitutional; that R. D. Meyer was legally domiciled in the State of Wyoming at the date of the commencement of the Wyoming action, at the date of the filing of the affidavit for constructive service and at the date of the decree and judgment therein; that the Wyoming court had jurisdiction over the person of the defendant Meyer and had jurisdiction to enter the judgment; that the alleged inconsistency between the judgment and the findings could have been corrected on appeal and while they may have constituted error do not make the judgment void on its face; that the Wyoming judgment is a valid and subsisting judgment of full force and effect as to all parties concerned; and that the suit constituted a collateral attack on the Wyoming judgment (R. 140-143).

Judgment was entered for the dismissal of the cause (R. 144).

Upon writ of error the Colorado Supreme Court reversed the judgment. (R. 237). In its opinion, after reviewing the facts, that court said (R. 230):

> "* * * we need not concern ourselves with the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter in the case before it, which we do not decide."

The court then held the judgment void on its face on the ground that by finding in favor of the validity of the May 3, 1924, contract between the Millikens and the Transcontinental Oil Company wherein the Millikens assigned to the Transcontinental their claims against Meyer with the provisos noted above, the Wyoming court deprived itself and Milliken of (R. 231) "any basis upon which it could predicate the judgment it later, and by the same decree, entered against Meyer." The Colorado Supreme Court said (R. 232):

> "When the Wyoming court entered a personal judgment against Meyer in favor of Milliken, whom it found had transferred and assigned his every claim against Meyer, it recorded an irreconcilable contradiction of the terms of the finding and decree, and these are so inconsistent as to result in a mere nullity, and particularly the judgment rendered in favor of Milliken and against Meyer."

(R. 234). "* * * (the Wyoming judgment) is void on its face because pronounced by a court which had deprived itself of jurisdiction to enter the particular judgment against Meyer. Judgments must conform to the findings of the court in such a substantial particular."

The judgment was reversed and the cause remanded (R. 236).

> "* * * with directions to enter judgment in favor of plaintiff and against W. B. Milliken and Margaret Milliken, and each of them, and the Texas Production Company and The Ohio Oil Company and each of them, for any and all monies shown to have been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds

from the interest herein involved or to be involved in the future."

A petition for writ of certiorari to review the judgment of the Colorado Supreme Court was denied by this Court on October 10, 1938, because of the lack of a final judgment (*Milliken et al. v. Meyer etc.*, 305 U. S. 598, 59 S. Ct. 63).

Upon remand to the Colorado district court no additional evidence was introduced and no change was made in the pleadings. The respondent Meyer tendered a form of judgment which was rejected (R. 181, 188-190). On December 27, 1938, the district court entered final judgment specifically adjudging the Wyoming judgment to be void. We quote from the decree (R. 192):

> "It Is Accordingly Considered, Ordered, Adjudged and Decreed,
>
> 1. That the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, v. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being docket No. 2148 in said Court, is null, void and of no effect."

The judgment further required the petitioners to pay to the respondent $5,746.17 with interest and provided that if Texas Production Company paid said amount it should have judgment against the other petitioners and that if The Ohio Oil Company paid, it should have judgment against the Millikens (R. 193). The Millikens were restrained from interfering with the collection by the respondent of 1/16th of the net profits from the oil and gas operations (R. 193-194).

The respondent then took the cause to the Colorado Supreme Court by writ of error contending that the judgment did not comply with the remittitur (R. 197). The petitioners, as permitted by the Colorado practice, filed as-

signments of cross error alleging that the district court erred in not giving full faith and credit to the Wyoming judgment as required by Section 1, Article IV of the Constitution of the United States (R. 199-210).

The Colorado Supreme Court on February 13, 1940, affirmed the judgment of the district court (R. 247). In referring in its opinion to the assignments of cross error, the court said (R. 246):

> "Cross assignments of error may be summarized in the principal point that we failed to give full faith and credit to the Wyoming judgment. Our disposition of that question on the former hearing was: 'In this equitable action, it is not a matter of the courts of this state being concerned about the full faith and credit of the constitutional provisions relative to judgments of a sister state, the important question being as to the effect of the judgment of a sister state—palpably void on its face—upon the rights of citizens of this state who are parties to the equitable cause of action in this state. A court of this state unquestionably has the power to enjoin the enforcement of such a foreign judgment between the citizens of this state who are before the court in the state.' 101 Colo., supra, page 583. We adhere to that statement, which adherence disposes of the cross assignments."

A petition for rehearing was filed by the petitioners again raising the point that under Section 1, Article IV of the Constitution of the United States they had the right to have the Wyoming judgment given full faith and credit by the Colorado Courts (R. 247-249). Rehearing was denied on March 4, 1940 (R. 249).

SPECIFICATION OF POINTS TO BE URGED.

The petitioners contend:

1. The Wyoming judgment is valid and subsisting and must be given full faith and credit in the Colorado courts.

2. Personal service of process in Colorado upon an individual domiciled in Wyoming gave the Wyoming court jurisdiction to enter a judgment in personam.

3. The Colorado courts may not refuse to give full faith and credit to the Wyoming judgment because of alleged errors and inconsistencies in that judgment.

SUMMARY OF THE ARGUMENT.

The argument for the petitioners may be summarized as follows:

1. Full faith and credit must be given valid and subsisting judgments of courts on one state by courts of other states.

2. The Wyoming judgment is not void because of lack of jurisdiction over the person of the defendant.

   a. Defendant had his domicile within Wyoming.

   b. The Wyoming statutes permit constructive service on residents of the state.

   c. The exercise of jurisdiction by a state through its courts may be based upon extraterritorial service of process on an individual having his domicile wthin the state.

   d. There has been no denial of due process of law.

3. The Wyoming judgment is not void because of errors or irregularities.

   a. A judgment may not be impeached by a mere showing of errors and irregularities.

b. The nature of the alleged errors and irregularities.

c. The alleged errors and irregularities of the Wyoming judgment did not justify the nullification of the judgment in this collateral attack.

ARGUMENT.

I.

FULL FAITH AND CREDIT MUST BE GIVEN VALID AND SUBSISTING JUDGMENTS OF COURTS OF ONE STATE BY COURTS OF OTHER STATES.

The petitioners contend that the Wyoming judgment is valid and subsisting and accordingly must be given full faith and credit by the Colorado courts.

It is well settled by repeated decisions of this Court that the full faith and credit clause of the constitution requires that the judgment of a state court which had jurisdiction of the parties and the subject matter in the suit shall be given, in the courts of every other state, the same credit, validity and effect which it has in the state where it was rendered and be equally conclusive on the merits. (*Roche v. McDonald*, 275 U. S. 449, 451, 48 S. Ct. 142, 143; *Adam v. Saenger*, 303 U. S. 59, 62, 58 S. Ct. 454, 456; *Titus v. Wallick*, 306 U. S. 282, 291, 59 S. Ct. 557, 562).

It is also well settled that notwithstanding the full faith and credit provision of the United States Constitution it may be shown in a collateral proceeding that the court in any state which renders a judgment did not have jurisdiction. (*Grover and Baker S. M. Co. v. Radcliffe*, 137 U. S. 287, 294, 11 S. Ct. 92, 94). Consequently it becomes necessary to consider whether or not the Wyoming judgment is void because of lack of jurisdiction.

II.

THE WYOMING JUDGMENT IS NOT VOID BECAUSE OF LACK OF JURISDICTION OVER THE PERSON OF THE DEFENDANT.

a. Defendant had his domicile within Wyoming.

R. D. Meyer, respondent's intestate against whom the Wyoming judgment was entered, had his domicile within the state of Wyoming. The Deputy Commissioner of Public Lands for Wyoming identified defendant's Exhibits 2 to 13 which were applications for leases addressed to the Commissioner of Public Lands for the State of Wyoming made at various dates from November 10; 1920 to April 9, 1932, for the leasing of mineral lands within that state. (R. 139, 140, 164, 165). In each of these Meyer stated that he was a resident and taxpayer of Wyoming. For an example, Exhibit 7 dated March 16, 1928 contained the following statement (R. 164):

> "I am a resident of the State of Wyoming, I am a voter and taxpayer in Carbon County, Wyoming."

Likewise, Exhibit 12. dated April 9, 1932, contained the following statement (R. 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 20 years."

A shorthand reporter testified that he took a deposition on oral interrogatories pursuant to a dedimus issued out of the Wyoming court on January 28. 1931, and that in response to the question as to whether he held his legal residence in Wyoming Mr. Meyer stated (R. 138):

> "Well, of course, that is a question that I am not qualified to properly elucidate. I can only say for your information that I am a taxpayer in Carbon County, Wyoming, and that I have always had a feeling that some day I might return there and reestablish my

association in Wyoming. In fact I have never voted in Denver."

At the conclusion of the first trial herein the district court found that R. D. Meyer was legally domiciled in the state of Wyoming at the date of the commencement of the action and at the date of the decree and judgment (R. 141). This finding has never been set aside.

b. The Wyoming statutes permit constructive service on residents of the state.

Section 5636 Wyoming Compiled Statutes 1920 (now Wyoming R. S. 1931, Sec. 89-817—see Appendix A) permit service by publication.

> "In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to void the service of a summons, or keeps himself concealed with like intent" (R. 12).

Section 5641, Wyoming Compiled Statutes 1920 (now Wyoming R. S. 1931, Sec. 89-822—see Appendix A) provides that in all cases where service may be made by publication personal service of a copy of the summons and petition may be made out of the state (R. 14). Meyer was personally served with summons in Denver, Colorado, on March 30, 1928 (R. 14-15).

Counsel for Milliken in the Wyoming action filed therein an "Affidavit for Constructive Service" alleging that Meyer was a resident of Wyoming and that since the filing of the action he had remained out of the state of Wyoming and concealed himself so that process could not be served upon him (R. 9-10). Meyer entered no appearance in the Wyoming case upon advice of counsel (R. 54). He appeared as a witness by giving his deposition (R. 137-138). Meyer was at all times fully informed and aware of the entry of the Wyoming judgment of July 11, 1931 (R. 98).

c. The exercise of jurisdiction by a state through its courts may be based upon extraterritorial service of process on an individual having his domicile within the state.

Every state has the authority to provide the means by which its own citizens may be brought before its courts. A state has jurisdiction over an individual domiciled in the state and can exercise jurisdiction over him through its courts by entering a judgment imposing a personal liability upon him. Such a judgment is valid and will be so recognized by other states. (*Restatement of the Law of Conflict of Laws*, Sections 77, 79; *Freeman on Judgments*, Fifth Edition, Section 1376.)

This case is distinguishable from *Pennoyer v. Neff*, 95 U. S. 714; 24 L. Ed. 565. In that case this Court ruled against the validity of an Oregon judgment based upon service of process by publication on a defendant who was a non-resident. In the instant case the Wyoming judgment is based upon the service of process upon an individual domiciled in Wyoming by the delivery of a copy of such process to the individual in the state of Colorado.

By reason of the relationship between the state and its citizens which affords protection to him and his property and imposes upon him duties as such he may be charged by judgment in personam binding on him every where as the result of legal proceedings instituted and carried on in conformity to the statutes of the state (*Hunt v. Hunt*, 72 N. Y. 217, 241; *Huntley v. Baker*, 33 Hun. (NY) 578, 580).

There appears to be no decision of this Court holding contra to the principle for which we contend. In *McDonald v. Mabee*, 243 U. S. 90, 37 S. Ct. 343, this Court held invalid a Texas judgment in personam based upon service by publication. The defendant was domiciled in Texas, left there with the intent to establish a home elsewhere, returned to Texas for a short time and later established his domicile

in Missouri. The service by publication was after his final departure from the state. The court held that service by publication "is not sufficient notice to bind a person who has left a state intending not to return" (243 U. S. 92, 37 S. Ct. 344). In the case at bar the defendant Meyer is shown to have been domiciled in Wyoming at the time of the commencement of the suit, at the time of the service of the summons, and at the time of the entry of the decree. He himself, in his deposition, indicated an intent to return to that state.

The principle for which the petitioners contend has been upheld in the state courts. We have cited supra the New York cases of *Hunt v. Hunt* and *Huntley v. Baker.* In *Northern Aluminum Company v. Law*, 157 Md. 641, 147 At. 715, the Maryland court of appeals upheld a judgment obtained in the province of Ontario, Canada, against an individual domiciled in Ontario who was personally served with summons in Baltimore, Maryland, the court holding that every state has authority to provide the means by which its own citizens may be brought before its courts and that judgments obtained upon such persons are not open to question on that ground in other states,

In *Ory v. Bosio*, 178 La. 221, 151 So. 187, the Supreme Court of Louisiana upheld the validity of a Louisiana statute authorizing the maintenance of a personal injury action against a temporarily absent resident of the state through the appointment of a curator ad hoc upon whom service may be had.

In *Becker v. Becker*, 218 S. W. 542 (Texas Civil Appeals), a personal money judgment in a divorce action based upon personal service as provided by Texas statute on a citizen of Texas while he was temporarily in Kansas City, Mo., was upheld. The court distinguished the case from

that of *McDonald v. Mabee*, supra, by saying (218 S. W. 545):

> "The court did not hold that when a citizen is absent from his state the courts thereof are as powerless with respect to the rendition of a personal judgment against him as if he resided in another state."

The decision in *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494, is contrary to the above decisions. Particular attention is directed to the dissenting opinion in the Raher case.

Meyer was domiciled in Wyoming and was taking advantage of such domicile in securing preferences in mineral leases. He should not be permitted to avoid the obligations imposed by the law of his domicile.

d. There had been no denial of due process of law.

The Wyoming judgment did not deprive the defendant Meyer of property without due process of law. He was then domiciled in Wyoming. He was personally served with a copy of the summons in Denver, Colorado, on March 30, 1928 (R. 14-15). He had ample opportunity to be heard by the Wyoming court. In January, 1931, his deposition was taken (R. 137-138). He did not appear upon advice of counsel (R. 54). He knew of the entry of the decree (R. 98).

The respondent does not question the jurisdiction of the Wyoming court over the subject matter. By Article V, Section 10, Wyoming Constitution, the Wyoming district courts are established as courts of general jurisdiction.

Meyer had actual notice of the pendency of this action against him in a court of his state. He did not avail himself of the opportunity to be heard. Under such circumstances he may not now complain of the unconstitutionality of the Wyoming statute and of the validity of the Wyoming judgment upon the ground of a denial of due process.

It has been held by this Court in *Wuchter v. Pizzutti*, 276 U. S. 13, 24, 48 S. Ct. 259, 262, after citing *McDonald v. Mabee*, supra, and other cases:

> "These cases and others indicate a general trend of authority towards sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

In the Wuchter case this Court held invalid a New Jersey statute, providing for service of process on non-residents in suits for injuries by the negligent operation of automobiles on its highways by service upon the New Jersey secretary of state, for the reason that the statute did not contain a provision making it reasonably probable that notice of the service on the secretary would be communicated to the non-resident defendant.

In *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, this Court upheld the validity of a Massachusetts statute similar to the New Jersey statute considered in the Wuchter case upon the grounds that the provision of the Massachusetts statute requiring notice of service on the registrar to be forwarded by registered mail to the defendant, and making the defendant's return receipt and plaintiff's affidavit sufficient service, satisfied the requirements as to notice. The court then pointed out (274 U. S. 356) that the statute required that the defendant should actually receive and receipt for the notice of the service and a copy of the process.

In the case at bar the Wyoming statute provides for personal service and such personal service was actually made by handing to the defendant a copy of the summons together with a copy of the petition (R. 15). The defendant had actual notice and full opportunity to be heard.

III.

THE WYOMING JUDGMENT IS NOT VOID BECAUSE OF ERRORS OR IRREGULARITIES.

a. A judgment may not be impeached by a mere showing of errors and irregularities.

The Colorado Supreme Court held the Wyoming judgment to be void upon the ground that it did not conform to the findings of the Court. The general rule is that when jurisdiction of an action sufficiently appears, or is satisfactorily shown, the judgment rendered therein cannot be impeached or avoided in another state on account of any alleged errors or irregularities committed by the court which rendered it and this is true although the error is such that on appeal the judgment would have been reversed.

In *Fauntleroy v. Lum*, 210 U. S. 230, 28 S. Ct. 641, this Court considered an action upon a Missouri judgment brought in a court of Mississippi. In holding that the Mississippi court should give effect to the Missouri judgment, the court said that whether the ruling of the Missouri court was right or wrong there could be no question that the judgment was conclusive in Missouri on the validity of the cause of action. After referring to the principle that a judgment is conclusive as to all the *media concludendi* (*U. S. v. California and Oregon Land Company*, 192 U. S. 355, 358, 24 S. Ct. 266, 267), the court announced the following rule: (210 U. S. 230, 237; 28 S. Ct. 643),

> "* * * it needs no authority to show that it (the Missouri judgment) can not be impeached either in or out of the state by showing that it was based upon a mistake of law."

In *Rooker v. Fidelity Trust Company*, 263 U. S. 413. 415, 44 S. Ct. 149, 150, this Court said:

> "If the decision was wrong, that did not make

> the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified it would be an effective and conclusive adjudication."

See also *Dugas v. American Surety Company of New York*, 300 U. S. 414, 425, 57 S. Ct. 515, 519.

The rule applicable here is the same as that applied in cases involving the principle of *res adjudicata*. Such rule was stated by this Court in the case of *U. S. v. Moser*, 266 U. S. 236, 242, 45 S. Ct. 66, 67, from which we quote:

> "But a *fact, question or right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

To the same effect is the rule laid down in *Reed v. Allen*, 286 U. S. 191, 201, 52 S. Ct. 532, 534 from which we quote:

> "* * * a judgment not set aside on appeal or otherwise is equally effective as an estoppel upon the points decided, whether the judgment be right or wrong."

b. The nature of the alleged errors and irregularities.

The Colorado Supreme Court held void the Wyoming judgment solely upon the ground that after the court found that Milliken had assigned to the Transcontinental Company his claim against Meyer by the agreement of May 3, 1924, it could not then enter judgment upon the claim in favor of Milliken (R. 232). It must be remembered that the assignee of the claim, Transcontinental Oil Company, was before the Wyoming court and had pleaded this contract in defense of the cause of action asserted against it by Milliken. The attorneys for the Transcontinental Company approved

the form of the Wyoming judgment (R. 39). One of the petitioners herein, The Ohio Oil Company, pleaded in this cause as a third defense and as a cross complaint against the Millikens the aforesaid agreement of May 3, 1924 (R. 83). It thus appears that the assignee of Milliken was a party to the Wyoming case and did not object to the entry of the judgment against Meyer upon the assigned claim. Likewise, the successors in interest of such assignee are parties to this cause and one of them has specifically pleaded the May 3, 1924 agreement (R. 95). Meyer may not defeat the claim of Milliken by relying upon the assignment when both the assignor and the assignee are parties to the litigation and make no objection to the judgment in favor of the assignor upon the assigned claim.

There is no showing whatsoever as to the evidence which was adduced before the Wyoming court. A judgment is presumed to be valid and it must be presumed that a sufficient showing was made to satisfy the Wyoming court that Milliken was entitled to his judgment particularly when the contract of assignment was before the court and the assignee specifically approved the form of judgment entered. Meyer may not take advantage of rights belonging solely to the assignee and its successors in interest who are parties to this litigation. In any event the alleged error does not render the judgment void. If a mistake was made it could have been corrected on appeal.

Wyoming statutes particularly provide full procedure for the correction of alleged irregularities or mistakes of law. The applicable statutes are appended hereto as Exhibit B (see also R. 106-108, 111).

c. The alleged errors and irregularities of the Wyoming judgment do not justify the nullification of the judgment in this collateral attack.

This is a collateral proceeding to impeach a Wyoming

judgment. The rule is well settled that errors and irregularities, however, gross, do not render a judgment absolutely void and are not available on collateral attack. The pertinent rule has been announced by this Court in *Baltimore S. S. Company v. Phillips*, 274 U. S. 316, 325, 47 S. Ct. 600, 604):

> "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause."

Likewise, in *Chandler v. Peketz*, 297 U. S. 609, 612, 56 S. C. 602, 604, this Court said:

> "Errors or procedural irregularities, if any, were subject to correction by the court itself or upon appeal but afforded no warrant for collateral attack upon the order."

The asserted errors and irregularities do not make the Wyoming judgment void on its face. It is a valid and subsisting judgment and may not be successfully impeached in this collateral proceeding.

CONCLUSION.

The Wyoming judgment debtor took no action during his lifetime to set aside the judgment. He was domiciled in that state and took advantage of the protection and preferences given by its laws. Legal proceedings against him in conformity with Wyoming laws are binding on him everywhere. The administratrix of his estate may not now impeach the judgment in this collateral attack. The decision of the Colorado Supreme Court refusing to give full faith and credit to that judgment because of mere errors and irregularities is a denial to the petitioners of a right under the Federal Constitution.

We ask that a writ of certiorari be granted and that upon final hearing the judgment be reversed.

Respectfully submitted,

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DENVER, COLORADO, May, 1, 1940.

APPENDIX A.

Pertinent Provisions of Statutes of Wyoming Relating to Constructive Service of Summons.

Section 5636, Wyoming Compiled Statutes 1920 now Section 89-817, Wyoming Revised Statutes 1931 (R. 11-14), provides:

> "Service by publication may be had in either of the following cases:
>
> * * * * * * * * * *
>
> "6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent;"

Section 5641, Wyoming Compiled Statutes 1920 now Section 89-822, Wyoming Revised Statutes 1931 (R. 14), provides:

> "In all cases where service may be made by publication under the provisions of this article, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

APPENDIX B.

Wyoming Statutes Relating to Vacation, Modification or Correction of Judgments and Decrees and the Time Within Which Such Proceedings Must be Taken.

Section 5923, Wyoming Compiled Statutes 1920 now Section 89-2301, Wyoming Revised Statutes 1931 (R. 106-108), provides:

> "A district court may vacate or modify its own judgment or order, after the term at which the same was made: * * *
>
> "(2). By a new trial granted in proceedings against defendants, constructively summoned, as provided in Sec. 89-817;
>
> "(3). For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order;
>
> "(4). For fraud practiced by the successful party in obtaining a judgment or order."

Section 5926, Wyoming Compiled Statutes 1920 now Section 89-2304 Wyoming Revised Statutes 1931 (R. 106-108), provides:

> "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment order, shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action; but the motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term."

Section 5927, Wyoming Compiled Statutes 1920 now Wyoming Revised Statutes 1931, Sec. 89-2305 (R. 106-108), provides:

> "The proceedings to vacate the judgment or order on the grounds specified in subdivisions four, five, six, seven, eight, nine and ten of Section 89-2301, shall be by petition, verified by affidavit setting forth the judgment or order, the grounds to vacate or modify it, and if the party applying was defendant, the de-

fense to the action, and on such petition a summons shall issue and be served as in the commencement of an action."

Section 5932, Wyoming Compiled Statutes 1920 now Wyoming Revised Statutes 1931, Sec. 89-2301 (R. 106-108), provides:

"Proceedings to vacate or modify a judgment or order for the causes mentioned in subdivisons four, five and seven of Section 89-2301, must be commenced within two years after the judgment was rendered, or order made, unless the party entitled thereto is an infant or a person of unsound mind, and in cases of such disability, within two years after the removal thereof; proceedings for the causes mentioned in subdivisions three and six of the same section shall be commenced within three years, and in subdivision nine within two years after the defendant has notice of the judgment."

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IN THE

Supreme Court of the United States

October Term 1940

No. 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

PETITIONERS,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased, RESPONDENT.

BRIEF OF PETITIONERS.

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IN THE

Supreme Court of the United States

October Term 1940

No. 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

PETITIONERS,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased, RESPONDENT.

BRIEF OF PETITIONERS.

OPINIONS OF COURT BELOW.

The first opinion of the Colorado Supreme Court is reported under the style of *Meyer v. Milliken et al.*, 101 Colo. 564, 76 P. (2d) 420 (see also R. 211-237). The second and last opinion of that court in this cause is reported under the same style in 105 Colo. 532, 100 P. (2d) 151 (see also R. 239-246).

JURISDICTION.

Jurisdiction is invoked under Section 237 of the Judicial Code (28 USCA 344 b). Certiorari was granted June 3, 1940 (see R. 256 and Advance Sheets 60 Supreme Court Reporter, June 15, 1940, p. 1099).

STATEMENT OF FACTS.

This action was brought by respondent Violet L. Meyer in the district court of the City and County of Denver, Colorado, to obtain equitable relief from a judgment of the district court of Carbon County, Wyoming, entered on July 11, 1931, against respondent's testate, R. D. Meyer, in an action wherein W. B. Milliken was plaintiff and Transcontinental Oil Company and R. D. Meyer were defendants. The complaint asserts (R. 55) that the Wyoming judgment is void because of a lack of jurisdiction over the person of the defendant R. D. Meyer, who allegedly was a resident of Colorado and was served in that state, and because of an alleged conflict between the findings of the court and the judgment in that the court found valid an agreement between W. B. Milliken and Transcontinental Oil Company whereby Milliken allegedly assigned to the Transcontinental company his claim against Meyer and after such finding the court gave judgment in favor of Milliken and against Meyer on that claim.

In their answers the petitioners allege that the Wyoming court had jurisdiction over Meyer because he was domiciled in Wyoming (R. 103) and under applicable and constitutional Wyoming statutes was personally served with process in Colorado (R. 104-105). It is further asserted that the Wyoming judgment is not void because of irregularities or inconsistencies and under Section 1, Article IV of the United States Constitution it must be given full faith and credit in the Colorado court (R. 109).

Consideration must be first given to the Wyoming judgment. Petitioner W. B. Milliken brought suit in the district court of Carbon County, Wyoming, on July 26, 1927 (R. 6) against R. D. Meyer and Transcontinental Oil Company alleging conspiracy and fraud to deprive him of his rights under a joint adventure agreement relating to certain oil lands (R. 7). The Transcontinental Company filed its answer (R. 16). Defendant Meyer was personally served with summons in Denver, Colorado, on March 30, 1928 (R. 14-15).

The applicable Wyoming statutes (now Wyoming R. S. 1931, Sections 89-817, 89-822) provide (R. 11-14):

> Sec. 5636, Wyoming Compiled Statutes, 1920—"Service by Publication."
>
> "Service by publication may be had in either of the following cases:
>
> * * * * *
>
> 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."
>
> Sec. 5641, Wyoming Compiled Statutes, 1920—"Personal Service Out of State."
>
> "In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

C. R. Ellery, attorney for Milliken, filed in the case his "Affidavit for Constructive Service" (R. 9) stating that Meyer was a resident of Wyoming, living a part of the time in Denver, Colorado, and a part of the time at Fort Steele, Carbon County, Wyoming, although defendant as aforesaid was and for many years had been a resident of said Fort Steele, Carbon County, Wyoming, and that since the filing of the action (R. 9):

> "* * * said defendant has remained out of the state of Wyoming, and has concealed himself, and now conceals himself to avoid the service of the summons issued out of the above named court in this cause, and since the filing of this suit, said defendant has and he does now so conceal himself that such process cannot be served upon him."

Meyer, upon the advice of his attorney (R. 54), made no appearance in the case. However, he testified as a witness as his deposition was taken by the plaintiff (R. 137-138).

The default of Meyer was entered and, after trial of the case without a jury, the court, in a decree dated July 11, 1931 (R. 32), specifically found that there was no joint adventure agreement between Milliken and the Transcontinental Company; that certain agreements dated May 3, 1924, executed by Milliken and the Transcontinental Company were valid and had been performed by the Transcontinental Company; that the action against the Transcontinental Company should be dismissed with prejudice; that the action of the court under the default of Meyer was (R. 34) "without prejudice to the findings and judgment in favor of said defendant corporation;" and that "as between the plaintiff, W. B. Milliken, and the defendant, R. D. Meyer, the court finds generally in favor of the plaintiff and against the defendant" (R. 34). The court then proceeded to find that there was a joint adventure agree-

ment between Milliken and Meyer in which each (R. 35) "was entitled to share equally in any money, profits, oil and/or gas rights and interests, or other real or personal property" derived therefrom; that the Transcontinental Company had by written agreement undertaken to pay Meyer a 1/16th part of the net profits and Milliken a 1/32nd part of the net profits from the oil and gas operations on the land covered by the joint adventure agreement; that in the total of 6/64ths of the net profits to be paid by the Transcontinental Company Meyer and Milliken should share equally, i. e., each should have 3/64ths (R. 36); that Meyer had actually received 4/64ths and had failed to account to Milliken for 1/64th (R. 36); that said 1/64th with interest amounted to $30,392.88 (R. 37). Judgment was then rendered against Meyer and in favor of Milliken in the amount of $30,392.88 with interest, and Meyer was restrained from receiving, and the Transcontinental Company was enjoined from paying to Meyer, more than 3/64ths of the net profits (R. 38). The judgment was approved as to form by the attorneys for the Transcontinental Oil Company (R. 39).

The petitioners The Ohio Oil Company and Texas Production Company succeeded to the rights and obligations of Transcontinental Oil Company (R. 4, 39). Milliken assigned his entire interest in the judgment to his wife, the petitioner Margaret M. Milliken (R. 121). By August 15, 1935, The Ohio Oil Company paid to Margaret M. Milliken a total of $4,829.49 on account of the 1/64th interest adjudged by the Wyoming Court to be the property of her assignor (R. 122-123).

R. D. Meyer was at all times fully informed of the entry of the Wyoming judgment of July 11, 1931, and of the fact that The Ohio Oil Company was withholding from him the 1/64th of the net profits referred to therein (R. 98).

After the death of R. D. Meyer on August 17, 1935, the respondent was appointed administratrix with the will annexed of his estate by the probate court of the City and County of Denver, Colorado, and under a permissive order of said probate court brought the instant action on October 29, 1935 (R. 3).

The pleadings set out the facts as alleged above. The complaint alleges that the Wyoming judgment is void because "rendered by said Court without jurisdiction of the person of said deceased" and because it "does not even follow nor conform to, but contravenes the findings of the Court as set forth in said decree" (R. 55) and that the said judgment violates Sec. 6, Art. I of the Wyoming Constitution and the Fifth and Fourteenth Amendments to the United States Constitution by taking property without due process (R. 55-56).

The answer of the Millikens alleges that the Wyoming judgment is entitled to full faith and credit under the Federal Constitution and that a refusal of such full faith and credit "would constitute a violation of said Article IV, Section 1 of the Constitution of the United States, and the rights of these defendants, and each of them, thereunder" (R. 109).

Upon trial to the court without a jury certain facts were adduced in addition to those heretofore mentioned.

H. N. Woodman, a shorthand reporter, testified that he took the oral deposition of R. D. Meyer pursuant to a dedimus issued on January 28, 1931, in a case pending in Carbon County, Wyoming, wherein W. B. Milliken was plaintiff and Transcontinental Oil Company and R. D. Meyer were the defendants and that in response to a question as to whether he held his legal residence in Wyoming, Meyer stated (R. 138):

"Well, of course, that is a question that I am

not qualified to properly elucidate. I can only say, for your information, that I am a taxpayer in Carbon County, Wyoming, and that I have always had a feeling that some day I might return there and reestablish my association in Wyoming. In fact I have never voted in Denver."

Chap. 62, Session Laws of Wyoming, 1921 (see also Wyoming R. S. 1931, Sec. 91-113), provides that in connection with leases of state land preference shall be given (R. 139) "to persons who are resident citizens and taxpayers of the state * * *."

The Deputy Commissioner of Public Lands for Wyoming identified certain applications pertaining to Wyoming lands and addressed to the Commissioner of Public Lands for the State of Wyoming. These applications, as defendants' exhibits 2 to 13, inclusive, were admitted in evidence (R. 139-140, 164-165). Exhibits 5, 6, 7 and 8 are each an application for a prospector's lease and are severally dated April 6, 1927, March 16, 1928, and April 1, 1929. Each is made by R. D. Meyer, Trustee, is signed by R. D. Meyer, Trustee, and contains the statement (R. 140, 164-165):

> "I am a resident of the State of Wyoming. I am a voter and taxpayer in Carbon County, Wyoming."

Exhibit 10 is a similar application dated March 17, 1930, and contains the following (R. 140, 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 40 years."

Likewise Exhibit 11, dated April 4, 1931, contains this statement (R. 140, 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 30 years."

A similar application is Exhibit 12 which is dated April 9, 1932, and says (R. 140, 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 20 years."

On May 3, 1924, two agreements were executed by W. B. Milliken and Transcontinental Oil Company. One provided for the receipt by Milliken of 1/32nd of the net production from the Hamilton Structure (part of the oil lands covered by the joint adventure agreement between Milliken and Meyer) (R. 17, 25-26). The other was an assignment by W. B. Milliken and Carl S. Milliken to Transcontinental Oil Company of "all and singular, their right, interest, claim and demand, of every kind or nature, as against the said R. D. Meyer in any wise pertaining to" the lands covered by the joint adventure agreement, provided however that Transcontinental should not compromise or settle any such claims with Meyer without securing a full release of all claims held by Meyer against Milliken and that the Millikens could interpose the assigned claims as a defense to any claim asserted against them by Meyer (R. 27-28).

The Colorado District Court found that the Wyoming statutes relating to service were applicable and constitutional; that R. D. Meyer was legally domiciled in the State of Wyoming at the date of the commencement of the Wyoming action, at the date of the filing of the affidavit for service and at the date of the decree and judgment therein; that the Wyoming court had jurisdiction over the person of the defendant Meyer and had jurisdiction to enter the judgment; that the alleged inconsistency between the judgment and the findings could have been corrected on appeal and while they may have constituted error do not make the judgment void on its face; that the Wyoming judgment is a valid and subsisting judgment of full force and effect as to all parties concerned; and that this suit constitutes a collateral attack on the Wyoming judgment (R. 140-143).

Judgment was entered for the dismissal of the cause (R. 144).

Upon writ of error the Colorado Supreme Court reversed the judgment (R. 237). In its opinion, after reviewing the facts, that court said (R. 230):

> "* * * we need not concern ourselves with the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter in the case before it, which we do not decide."

The court then held the judgment void on its face on the ground that by finding in favor of the validity of the May 3, 1924, contract between the Millikens and the Transcontinental Oil Company wherein the Millikens assigned to the Transcontinental their claims against Meyer with the provisos noted above, the Wyoming court deprived itself and Milliken of (R. 231) "any basis upon which it could predicate the judgment it later, and by the same decree, entered against Meyer." The Colorado Supreme Court said (R. 232):

> "When the Wyoming court entered a personal judgment against Meyer in favor of Milliken, whom it found had transferred and assigned his every claim against Meyer, it recorded an irreconcilable contradiction of the terms of the finding and decree, and these are so inconsistent as to result in a mere nullity, and particularly the judgment rendered in favor of Milliken and against Meyer."
>
> (R. 234). "* * * (the Wyoming judgment) is void on its face because pronounced by a court which had deprived itself of jurisdiction to enter the particular judgment against Meyer. Judgments must conform to the findings of the court in such a substantial particular."

The judgment was reversed and the cause remanded (R. 236):

> "* * * with directions to enter judgment in favor of plaintiff and against W. B. Milliken and Margaret Milliken, and each of them and the Texas Production Company and The Ohio Oil Company and each of them, for any and all monies shown to have been paid the Millikens by virtue of the Wyoming decree and that an order be entered enjoining the defendants, the Millikens, from in any way interfering with the collection by plaintiff of the proceeds from the interest herein involved or to be involved in the future."

A petition for writ of certiorari to review the judgment of the Colorado Supreme Court was denied by this Court on October 10, 1938, because of the lack of a final judgment (*Milliken et al. v. Meyer*, 305 U. S. 598, 59 S. Ct. 63).

Upon remand to the Colorado district court no additional evidence was introduced and no change was made in the pleadings. The respondent Meyer tendered a form of judgment which was rejected (R. 181, 188-190). On December 27, 1938, the district court entered final judgment specifically adjudging the Wyoming judgment to be void. We quote from the decree (R. 192):

> "It is Accordingly Considered, Ordered, Adjudged and Decreed,
>
> 1. That the judgment of the District Court of Carbon County, Wyoming, entered on July 11, 1931, in that certain action entitled W. B. Milliken, plaintiff, v. Transcontinental Oil Company, a corporation, and R. D. Meyer, defendants, the same being docket No. 2148 in said Court, is null, void and of no effect."

The judgment further required the petitioners to pay to

the respondent $5,746.17 with interest and provided that if Texas Production Company paid said amount it should have judgment against the other petitioners and that if The Ohio Oil Company paid, it should have judgment against the Millikens (R. 193). The Millikens were restrained from interfering with the collection by the respondent of 1/16th of the net profits from the oil and gas operations (R. 193-194).

The respondent then took the cause to the Colorado Supreme Court by writ of error contending that the judgment did not comply with the remittitur (R. 197). The petitioners, as permitted by the Colorado practice (Colorado Supreme Court Rule No. 32, 1935 Colorado Code of Civil Procedure, Sec. 421) filed assignments of cross error alleging that the district court erred in not giving full faith and credit to the Wyoming judgment as required by Section 1, Article IV of the Constitution of the United States (R. 199-210).

The Colorado Supreme Court on February 13, 1940, affirmed the judgment of the district court (R. 247). In referring in its opinion to the assignments of cross error, the court said (R. 246):

> "Cross assignments of error may be summarized in the principal point that we failed to give full faith and credit to the Wyoming judgment. Our disposition of that question on the former hearing was: 'In this equitable action, it is not a matter of the courts of this state being concerned about the full faith and credit of the constitutional provisions relative to judgments of a sister state, the important question being as to the effect of the judgment of a sister state—palpably void on its face—upon the rights of citizens of this state who are parties to the equitable cause of action in this state. A court of this state unquestionably has the power to enjoin the enforcement of such a foreign judgment between the citizens of

this state who are before the court in 'the state.' 101 Colo., supra, page 583. We adhere to that statement, which adherence disposes of the cross assignments."

A petition for rehearing was filed by the petitioners again raising the point that under Section 1, Article IV of the Constitution of the United States they had the right to have the Wyoming judgment given full faith and credit by the Colorado Courts (R. 247-249). Rehearing was denied on March 4, 1940 (R. 249). Certiorari was granted by this Court on June 3, 1940 (R. 256).

SPECIFICATION OF POINTS TO BE URGED.

The petitioners contend:

1. Extraterritorial service of process upon the judgment debtor who had his domicile in Wyoming was sufficient to give the Wyoming court jurisdiction to render a judgment in personam.

2. The alleged errors and irregularities, which do not affect the jurisdiction of the court, afford no justification for the failure of the Colorado courts to give full faith and credit to the Wyoming judgment.

3. The Wyoming judgment is valid and subsisting and, under Section 1, Article IV of the Constitution of the United States must be given full faith and credit in Colorado.

SUMMARY OF THE ARGUMENT.

The argument for the petitioners may be summarized as follows:

1. Full faith and credit must be given valid and subsisting judgments of courts of one state by courts of other states.

2. The Wyoming Court had jurisdiction.

a. Objections raised to jurisdiction.

b. The judgment debtor had his domicile in Wyoming.

c. The Wyoming statutes authorize extraterritorial service of process on residents of the state in actions in personam.

d. A judgment in personam based upon extraterritorial service of process on an individual domiciled within the state of the court rendering the judgment is valid.

3. The Wyoming judgment may not be denied full faith and credit because of alleged errors and irregularities not concerning the jurisdiction of the court.

a. Jurisdiction having attached, a judgment may not be impeached by a mere showing of errors and irregularities.

b. The nature of the alleged errors and irregularities.

c. A judgment may not be impeached in a collateral attack because of errors and irregularities not affecting the jurisdiction of the court.

ARGUMENT.

I.

FULL FAITH AND CREDIT MUST BE GIVEN VALID AND SUBSISTING JUDGMENTS OF COURTS OF ONE STATE BY COURTS OF OTHER STATES.

The petitioners contend that the Wyoming judgment is valid and subsisting and accordingly must be given full faith and credit by the Colorado courts.

It is well settled by repeated decisions of this Court that the full faith and credit clause of the constitution requires that the judgment of a state court which had jurisdic-

tion of the parties and the subject matter in the suit shall be given, in the courts of every other state, the same credit, validity and effect which it has in the state where it was rendered and be equally conclusive on the merits. (*Roche v. McDonald*, 275 U. S. 449, 451, 48 S. Ct. 142, 143; *Adam v. Saenger*, 303 U. S. 59, 62, 58 S. Ct. 454, 456; *Titus v. Wallick*, 306 U. S. 282, 291, 59 S. Ct. 557, 562).

In her brief in opposition to the petition for certiorari the respondent raised the point that the record does not contain an authenticated or duly attested copy of the judgment or record of the Wyoming court. R. S. 905 (28 USCA 687) merely provides a mode of proving the judicial proceedings of a state court (*South Ottawa v. Perkins*, 4 Otto 260, 271, 24 L. Ed. 154, 159). In the instant case the respondent pleaded the Wyoming judgment (R. 32-39). Hence there was no need for the petitioners to offer in proof an authenticated copy thereof. Moreover this action was brought by the respondent to avoid the Wyoming judgment. It is not an action to enforce that judgment. Whatever disability results from the failure to introduce in evidence an authenticated copy of the Wyoming judgment affects the respondent's cause of action, not the petitioners' defense thereto.

It is well settled that notwithstanding the full faith and credit provision of the United States Constitution it may be shown in a collateral proceeding that the court in any state which renders a judgment did not have jurisdiction. (*Grover and Baker S. M. Co. v. Radcliffe*, 137 U. S. 287, 294, 11 S. Ct. 92, 94). Consequently it becomes necessary to consider whether or not the Wyoming judgment is void because of lack of jurisdiction.

II.

THE WYOMING COURT HAD JURISDICTION.

a. Objections raised to jurisdiction.

The respondent in her complaint has contended that the Wyoming Court did not have jurisdiction to render the judgment in question because process was served upon her testate in the State of Colorado. She does not question the jurisdiction of the Wyoming court over the subject matter. The judgment complained of was entered by the district court of Carbon County, Wyoming (R. 6, 32-39). By Article V, Section 10, Wyoming Constitution, the Wyoming district courts are established as courts of general jurisdiction. A court of general jurisdiction is presumed to have jurisdiction over the subject matter and the parties unless disproved by extrinsic evidence or the record itself (*Adam v. Saenger*, 303 U. S. 59, 62, 58 S. Ct. 454, 456).

b. The judgment debtor had his domicile in Wyoming.

R. D. Meyer, respondent's testate against whom the Wyoming judgment was entered, had his domicile within the state of Wyoming at the time of the filing of the suit (July 26, 1927, R. 6), the service of the summons (March 30, 1928, R. 14) and the entry of the judgment (July 11, 1931, R. 32-39). This conclusively appears from lease applications made by Meyer to the Commissioner of Public Lands of the state of Wyoming. Under the Wyoming law preferences shall be given in connection with oil and gas prospectors' leases "to persons who are resident citizens and taxpayers of the state * * *" (R. 139, Chap. 62, Session Laws of Wyoming, 1921, Wyoming R. S. 1931, Sec. 91-113).

The Deputy Commissioner of Public Lands for Wyoming identified defendant's Exhibits 2 to 13 as applications for leases addressed to the Commissioner of Public Lands for the state of Wyoming made at various dates from No-

vember 10, 1920, to April 9, 1932, for the leasing of mineral lands within that state (R. 139, 140, 164, 165). In each of these Meyer stated that he was a resident and taxpayer of Wyoming. For an example, Exhibit 7 dated March 16, 1928, contained the following statement (R. 164):

> "I am a resident of the State of Wyoming, I am a voter and taxpayer in Carbon County, Wyoming."

Likewise, Exhibit 12, dated April 9, 1932, contained the following statement (R. 165):

> "I have been a bona fide resident and taxpayer of Wyoming for 20 years."

A shorthand reporter testified that he took a deposition on oral interrogatories pursuant to a dedimus issued out of the Wyoming court on January 28, 1931, and that in response to the question as to whether he held his legal residence in Wyoming Mr. Meyer stated (R. 138):

> "Well, of course, that is a question that I am not qualified to properly elucidate. I can only say for your information that I am a taxpayer in Carbon County, Wyoming, and that I have always had a feeling that some day I might return there and reestablish my association in Wyoming. In fact I have never voted in Denver."

The respondent has offered no evidence whatsoever to disprove petitioners' assertion that Meyer had his domicile in the state of Wyoming.

At the conclusion of the first trial herein the district court found that R. D. Meyer was legally domiciled in the state of Wyoming at the date of the commencement of the action and at the date of the decree and judgment (R. 141). This finding has never been set aside.

c. The Wyoming statutes authorize extraterritorial service of process on residents of the state in actions in personam.

The pertinent statutes are Section 5636 Wyoming Compiled Statutes 1920 (now Wyoming R. S. 1931, Sec. 89-817) and Section 5641 Wyoming Compiled Statutes 1920 (now Wyoming R. S. 1931, Sec. 89-822). These statutes are set out in full in Appendix A to this brief and may be found in the Record at pages 11-14.

Section 5641 particularly authorizes extraterritorial service and reads as follows (R. 14):

> "Personal service out of state. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

Service by publication is covered by Section 5636, the pertinent provisions of which are these (R. 11-13):

> "Service by Publication. Service by publication may be had in either of the following cases:
>
> * * * * *
>
> 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."

It is noteworthy that this subdivision 6 of Section 5636

refers generally to "actions" and does not confine its application to actions in rem. Other subdivisions of this section do refer specifically to actions in rem (see Appendix A), but they have no bearing on the case under consideration. Indeed there is nothing in the statutes of Wyoming or decisions of the Wyoming courts which restricts or limits the applicability of subdivision 6 to actions in rem. The language of subdivision 6 being clear and definite, the rule applies that where the words are plain there is no room for construction (*Osaka Shosen Kaisha Line v. U. S.*, 300 U. S. 98, 101, 57 S. Ct. 356, 357). To treat subdivsion 6 as if the words "in rem" appear after the word "action" would be judicial legislation.

An affidavit as required by the Wyoming practice (Wyoming R. S. 1931, Sec. 89-819) was filed by counsel for Milliken in the Wyoming action. The affidavit stated that Meyer was a resident of Wyoming and that since the filing of the action he had remained out of the state and had concealed himself so that process could not be served upon him (R. 9-10). Meyer was personally served with summons in Denver, Colorado, on March 30, 1928 (R. 14-15). He gave his deposition in the case on January 28, 1931 (R. 138). No evidence has been adduced either by Meyer in the Wyoming case or by his administratrix in this case to show that Meyer was not domiciled in Wyoming as claimed by the petitioners. Meyer entered no appearance in the Wyoming case upon advice of counsel (R. 54). He was at all times fully informed and aware of the entry of the Wyoming judgment (R. 98).

Meyer had actual notice of the pendency of the Wyoming action and full opportunity to be heard. He was not denied due process of law. By reason of his domicile in Wyoming he was subject to its laws relative to the service of process and a judgment rendered in accordance with those laws may not now be avoided by his administratrix.

d. A judgment in personam based upon the extra-territorial service of process upon an individual domiciled within the state of the court rendering the judgment is valid.

The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided (*Honeyman v. Hanan*, 302 U. S. 375, 378, 58 S. Ct. 273, 274). In the case at bar there was actual notice to the defendant Meyer and full opportunity to be heard was afforded. The question presented is solely whether the Wyoming court secured jurisdiction to render a judgment in personam against the Wyoming citizen by actual service of process upon him in Colorado.

The original conception of the foundation of jurisdiction was based upon physical power over the individual (*McDonald v. Mabee*, 243 U. S. 90, 91, 37 S. Ct. 343). In recent years there has been a marked tendency to get away from the physical power theory and to predicate jurisdiction upon consent. Jurisdiction by consent has come to be regarded as consistent with the requirements both of due process and of the principles of conflict of laws (Dodd, "Jurisdiction in Personal Actions," 23 Illinois Law Review 427). Indicative of this trend are the cases of *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, and *Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, which concerned state statutes providing for service of process on non-residents in suits involving injuries caused by the negligent operation of automobiles on state highways. In those cases the consent was implied from the use of the highway. Likewise consent has been implied in cases concerned with the service of process upon foreign corporations (*Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. Ed. 451, 452, *Mutual Re-*

serve Fund Life Assoc. v. Phelps, 190 U. S. 147, 23 S. Ct. 707, *State of Washington v. Supreme Court*, 289 U. S. 361, 364, 53 S. Ct. 624, 626). By a logical application of this doctrine the establishment of a domicile carries with it a consent to the service of process in accordance with the statutes of the state of domicile.

A person owes allégiance to the state of his domicile and submits himself to the operation of its laws (*Hunt v. Hunt*, 72 N. Y. 217, 239). The protection which the state affords to its citizens and their property imposes upon them certain duties, among which is the obligation of responding to process served in conformity with the statutes of the state. (*Huntley v. Baker*, 33 Hun. (N. Y.) 578, 580).

This view is in accord with the Restatement of the Law of Conflict of Laws wherein the rule is announced (Sec. 47) that a state has jurisdiction over a person if he is domiciled in the state although not present there and (Sec. 79) that a state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state.

The weight of American authority supports the view that domicile is a sufficient basis for jurisdiction in personam provided that a reasonable method of giving notice is employed (Dodd, supra, p. 435). The principle has been recognized in *In re Hendrickson*, 40 S. D. 211, 167 N. W. 172 (personal service without state), *Becker v. Becker*, 218 S. W. 542 (Texas Civil Appeals—personal service without state), *Hunt v. Hunt*, 72 N. Y. 217 (service on curator ad hoc), *Ory v. Bosio*, 178 La. 221, 151 So. 187 (service on curator ad hoc), *Hurlburt v. Thomas*, 55 Conn. 181 (service at usual place of abode), *Bryant v. Shute's Exec.*, 147 Ky. 268, 144 S. W. 28 (service at usual place of abode), *Huntley v. Baker*, 33 Hun. (N. Y.) 578 (service at usual place of abode), *Henderson v. Staniford*, 105 Mass. 504 (service by publication), *Bickerdike v. Allen*, 157 Ill. 95, 41

N. E. 740 (service by publication), *Harryman v. Roberts*, 52 Md. 64 (service at usual place of abode), *Sturgis v. Fay*, 16 Ind. 429 (service at usual place of abode), *Bradford v. Pugh*, 13 Ark. 33 (service at usual place of abode), *Roberts v. Roberts*, 135 Minn. 397, 161 N. W. 148 (service by publication), *Cole v. Hoeburg*, 36 Kan. 263, 13 Pac. 275 (service by publication), *Northern Aluminum Co. v. Law*, 157 Md. 641, 147 At. 715 (Canadian judgment based on personal service in United States), 3 Freeman on Judgments (5th Ed.), Sec. 1376, p. 2845, 2 Black on Judgments (2nd Ed.), Sec. 907, p. 1349, 21 R. C. L. 1269, 1292, 34 C. J. 1147, 126 A. L. R. 1474.

Contrary to the above cases are *De la Montanya v. De la Montanya*, 112 Calif. 101, 44 Pac. 345, *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494, and *Moss v. Fitch*, 212 Mo. 484; 111 S. W. 475. Particular attention is directed to the dissenting opinions in the *De la Montanya* and *Raher* cases.

Our research fails to disclose any decision of this Court declaring invalid a judgment of a state court upon the ground of lack of jurisdiction because of service without the state when such service is made under an applicable statute upon an individual domiciled within the state. *Pennoyer v. Neff*, 5 Otto 714, 24 L. Ed. 565, clearly applies only to a judgment in personam entered upon service by publication against a non-resident defendant. It was not the intent of that decision to determine the right of a state to summon its citizens to respond to a personal action by service without the borders of the state. It is significant as pointed out by the annotator in 35 L. R. A. (N. S.) 297 that the head notes to that decision as printed in 24 L. Ed. 565 were prepared by Justice Fields, the author of the opinion, and restrict the rule there announced to constructive or substituted service on non-residents in actions in personam (see particularly headnote 5).

In *McDonald v. Mabee*, 243 U. S. 90, 37 S. Ct. 343, this Court held invalid a Texas judgment in personam based upon

service by publication for the reason that publication is not sufficient notice to bind a person who has left a state intending not to return. Such a situation is vastly different from that presented in the case at bar wherein the absent defendant, who was actually domiciled in Wyoming and who stated an intent to return there (R. 138), was personally served with process.

Similarly other cases decided by this Court may be distinguished from this case. In *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761, the service was by publication and it does not appear whether the defendants were residents or non-residents. In *Knowles v. Logansport Gas-Light and Coke Co.*, 19 Wall. 58, 22 L. Ed. 70, the case involved non-residents. In *Earle v. McVeigh*, 1 Otto 503, 23 L. Ed. 398, service was held insufficient when the summons was left at a dwelling which had been abandoned by the family. In *Harkness v. Hyde*, 8 Otto 476, 25 L. Ed. 237, the Court ruled against the validity of a judgment entered by a court of Idaho territory upon service made upon an Indian reservation. It does not appear from the decision whether the defendant was a resident or non-resident and there was apparently no statute authorizing the service.

Domicile is a proper test of jurisdiction to enter a personal judgment. It was said by this Court in *Grover & Baker S. M. Co. v. Radcliffe*, 137 U. S. 287, 297, 11 S. Ct. 92, 95, that:

> "Publicists concur that domicile generally determines the particular territorial jurisprudence to which every individual is subjected. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign, but in other matters, their domicile is in the particular state, and that determines the applicatory territorial jurisprudence."

There is no logical reason to deny validity to process merely because an act without the borders of the state is required. The question of the right of one state to serve process upon one of its citizens in another state involves merely the relationship of the two states. Whatever objection the state in which the process is served might have cannot be taken advantage of by the individual so served. The relationship between him and the state of his domicile subjects him to service of process in conformity with the statutes of his state (Restatement of the Law of Conflict of Laws, Sec. 79).

In *Blackmer v. U. S.*, 284 U. S. 421, 52 S. Ct. 252, this Court upheld a judgment of contempt rendered against Blackmer, a citizen of the United States, for failure to respond to a subpoena served upon him in France and requiring him to appear as a witness on behalf of the United States at a criminal trial. While that case did not present the questions which arise in cases where obligations inherent in allegiance are not involved, the Court in upholding the jurisdiction of the United States over its absent citizens discussed the validity of the service of the subpoena in France and said (284 U. S. 439):

> "The question of the validity of the provision for actual service of the subpoena in a foreign country is one that arises solely between the government of the United States and the citizen. The mere giving of such notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government and the citizen has no standing to invoke any such supposed right."

By the same reasoning the respondent has no standing to invoke protection from the extraterritorial service of process. The proceedings against her testate were in conformity with the law of the state of his domicile.

In an action in rem jurisdiction obtained by attachment of the property and service of summons by publication is valid (*Cooper v. Reynold's Lessee*, 10 Wall. 308, 19 L. Ed. 931). In *Roller v. Holly*, 176 U. S. 398, 405, 20 S. Ct. 410, 412, this Court ruled that personal service on non-residents outside of the state may be sufficient to constitute due process of law in a suit for foreclosure of a lien upon land within the state. In other words, in proceedings in rem against non-residents, service either by publication or by personal service outside of the state is valid and judgments based thereon are entitled to full faith and credit. It is submitted that there is no reason why the same rule may not be applied to judgments in personam against residents of the state.

The mere fact that the defendant was without the state at the time of service does not militate against the validity of the service. If the absence from the state of the defendant sought to be charged is sufficient to invalidate the service of process, the recognized methods of substituted service such as leaving a copy of the summons at the defendant's residence within the state are without validity. Yet such service has been impliedly upheld by this Court (*McDonald v. Mabee*, 243 U. S. 90, 92, 37 S. Ct. 343, 344, *Earle v. McVeigh*, 1 Otto 503, 508, 23 L. Ed. 398, 400). The personal service of a summons upon an individual gives him actual notice of the suit. Service by leaving a copy of the summons at the usual place of abode may or may not afford such actual notice. Surely a procedure which renders notice certain is to be preferred to one lacking in such certainty. It is submitted that there is no justification for declaring substituted service on an absent citizen valid and personal service without the state invalid.

Modern transportation, modern communication and modern jurisprudence require a modern attitude towards the service of process. As this Court said in *Wuchter v. Piz-*

zuti, 276 U. S. 13, 24, 48 S. Ct. 259, 262, after citing *McDonald v. Mabee* and other cases:

> "These cases and others indicate a general trend of authority towards sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

In the case at bar the defendant received actual notice. He had his domicile in Wyoming and, during the pendency of the action there, he was taking advantage of the preferential rights given those domiciled in that state. By the acceptance of Wyoming domicile he consented to the service of civil process in accordance with Wyoming laws. A judgment based upon such service is, we say, entitled to full faith and credit.

III.

THE WYOMING JUDGMENT MAY NOT BE DENIED FULL FAITH AND CREDIT BECAUSE OF ALLEGED ERRORS AND IRREGULARITIES NOT CONCERNING THE JURISDICTION OF THE COURT.

a. Jurisdiction having attached, a judgment may not be impeached by a mere showing of errors and irregularities.

There is no claim by the respondent of fraud or collusion and no suggestion by her that her testate was prevented from interposing any defense which he might have had to the Wyoming suit. In fact there is no intimation that Meyer had any defense to the cause of action there asserted. The only point raised is that the Wyoming court erred as a matter of law in awarding judgment in favor of

Milliken on a cause of action which had been allegedly assigned to the Transcontinental Company. Attention is directed to the fact that the Transcontinental Company was a party to that suit and its attorneys specifically approved the form of judgment (R. 39).

The Colorado Supreme Court held the Wyoming judgment to be void upon the ground that it did not conform to the findings of the Court. The general rule is that when jurisdiction of an action sufficiently appears, or is satisfactorily shown, the judgment rendered therein cannot be impeached or avoided in another state on account of any alleged errors or irregularities committed by the court which rendered it and this is true although the error is such that on appeal the judgment would have been reversed. (*Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. Ed. 931, 932, *Cornett (Nash) v. Williams*, 20 Wall. 226, 250, 22 L. Ed. 254, 258).

In *Fauntleroy v. Lum*, 210 U. S. 230, 28 S. Ct. 641, this Court considered an action upon a Missouri judgment brought in a court of Mississippi. In holding that the Mississippi court should give effect to the Missouri judgment, the Court said that whether the ruling of the Missouri court was right or wrong there could be no question that the judgment was conclusive in Missouri on the validity of the cause of action. After referring to the principle that a judgment is conclusive as to all the *media concludendi* (*U. S. v. California and Oregon Land Company*, 192 U. S. 355 358, 24 S. Ct. 266, 267), the court announced the following rule (210 U. S. 237, 28 S. Ct. 643):

> "* * * it needs no authority to show that it (the Missouri judgment) can not be impeached either in or out of the state by showing that it was based upon a mistake of law."

In *Rooker v. Fidelity Trust Company*, 263 U. S. 413, 415, 44 S. Ct. 149, 150, this Court said:

> "If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified it would be an effective and conclusive adjudication."

See also *Dugas v. American Surety Company of New York*, 300 U. S. 414, 425, 57 S. Ct. 515, 519 and *U. S. v. Throckmorton*, 8 Otto 61, 65, 25 L. Ed. 93, 95.

The rule applicable here is the same as that applied in cases involving the principle of *res adjudicata*. Such rule was stated by this Court in the case of *U. S. v. Moser*, 266 U. S. 236, 242, 45 S. Ct. 66, 67, from which we quote:

> "But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

To the same effect is the rule laid down in *Reed v. Allen*, 286 U. S. 191, 201, 52 S. Ct. 532, 534, from which we quote:

> "* * * a judgment not set aside on appeal or otherwise is equally effective as an estoppel upon the points decided, whether the judgment be right or wrong."

b. The nature of the alleged errors and irregularities.

The Colorado Supreme Court held void the Wyoming judgment solely upon the ground that after the court found that Milliken had assigned to the Transcontinental Company his claim against Meyer by the agreement of May 3, 1924, it could not then enter judgment upon the claim in favor of Milliken (R. 232). It must be remembered that the assignee of the claim, Transcontinental Oil Company, was be-

fore the Wyoming court and had pleaded this contract in defense of the cause of action asserted against it by Milliken. The attorneys for the Transcontinental Company approved the form of the Wyoming judgment (R. 39). One of the petitioners herein, The Ohio Oil Company, pleaded in this cause as a third defense and as a cross complaint against the Millikens the aforesaid agreement of May 3, 1924 (R. 83). It thus appears that the assignee of Milliken was a party to the Wyoming case and did not object to the entry of the judgment against Meyer upon the assigned claim. Likewise, the successors in interest of such assignee are parties to this cause and one of them has specifically pleaded the May 3, 1924, agreement (R. 95). Meyer may not defeat the claim of Milliken by relying upon the assignment, to which he was not a party, when both the assignor and assignee are parties to the litigation and make no objection to the judgment in favor of the assignor upon the assigned claim.

There is no showing whatsoever as to the evidence which was adduced before the Wyoming court. A judgment is presumed to be valid and it must be presumed that a sufficient showing was made to satisfy the Wyoming court that Milliken was entitled to his judgment particularly when the contract of assignment was before the court and the assignee specifically approved the form of judgment entered.

No contention has been made that Meyer had any defense to the cause of action set up against him in the Wyoming suit. His administratrix may not now avoid the judgment there rendered by asserting a supposed right which exists, if at all, in an assignee of Milliken which was a party to the Wyoming case or in an assignee of that assignee which is a party to this case. In other words, all parties in interest have been present both in the Wyoming suit and in this suit.

Wyoming statutes provide full procedure for the correction of alleged irregularities or mistakes of law. The applicable statutes are appended hereto as Exhibit B (see also R. 106-108, 111). If Meyer considered the Wyoming judgment erroneous, he had full opportunity to assert his contentions and be heard. Although he lived four years after the rendition of that judgment, he made no effort to have the judgment changed. His administratrix, the present respondent, has no greater rights than he had.

c. A judgment may not be impeached in a collateral attack because of errors and irregularities not affecting the jurisdiction of the court.

This is an independent suit in a court other than that in which the judgment complained of was entered, is predicated in part on matters *dehors* the record, and seeks relief in addition to having the judgment declared invalid (R. 57-60). Hence, it is a collateral attack on the Wyoming judgment (*Murrell v. Stock Growers Nat. Bank*, 74 F. (2d) 827, 833 (C. C. A. 10)).

The Wyoming court, having jurisdiction of the parties and the subject matter, had the power to decide the question presented and its judgment therein is not open to collateral attack for alleged errors and irregularities in exercising that power (*Johnson v. Manhattan Ry. Co.*, 289 U. S. 479, 496, 53 S. Ct. 721, 727, *Marchand v. Frellsen*, 15 Otto 423, 428, 26 L. Ed. 1057, 1059).

The rule that a judgment cannot be collaterally attacked merely because it is erroneous has become an "axiom of the law" (*Owens v. Battenfield*, 33 F. (2d) 753, 757 (C. C. A. 8)). A clear expression of the rule is found in *Baltimore S. S. Company v. Phillips*, 274 U. S. 316, 325, 47 S. Ct. 600, 604):

> "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause."

Likewise, in *Chandler v. Peketz*, 297 U. S. 609, 612, 56 S. Ct. 602, 604, this Court said:

> "Errors or procedural irregularities, if any, were subject to correction by the court itself or upon appeal but afforded no warrant for collateral attack upon the order."

The asserted errors and irregularities do not make the Wyoming judgment void on its face. It is a valid and subsisting judgment and may not be successfully impeached in this collateral proceeding.

CONCLUSION.

The Wyoming judgment debtor took no action during his lifetime to set aside the judgment. He was domiciled in that state and took advantage of the protections and preferences given by its laws. Extraterritorial service of process on him as provided by Wyoming law gave the Wyoming court jurisdiction to render a judgment in personam. That judgment may not be impeached in a suit brought by his administratrix four years after the rendition thereof upon the ground of alleged errors and irregularities not affecting jurisdiction.

The petitioners ask that the judgment of the Colorado supreme court, which failed to give full faith and credit

the Wyoming judgment, be reversed with appropriate directions.

Respectfully submitted,

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VER, COLORADO, October 7, 1940.

APPENDIX A.

Pertinent Provisions of Statutes of Wyoming Relating to Service of Summons.

Section 5636, Wyoming Compiled Statutes 1920, now Section 89-817, Wyoming Revised Statutes 1931 (R. 11-14), provides:

Service by publication may be had in either of the following cases:

1. In actions under the first three sections of the last preceding chapter, when the defendant resides out of the state, or his residence cannot be ascertained.

2. In actions to establish or set aside a will where the defendant resides out of the state, or his residence cannot be ascertained.

3. In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defendant's place of residence is unknown, and in actions against a corporation incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by Sec. 5631 and which has no place of doing business in this state.

4. In actions which relate to, or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence cannot be ascertained.

5. In actions against executors, administrators or guardians, when the defendant has given bond as such in

this state, but at the time of the commencement of the action is a non-resident of the state, or his place of residence cannot be ascertained.

6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent.

7. When a defendant in a petition in error has no attorney of record in this state, and is a non-resident of, and absent from the same, or has left the same to avoid the service of a summons in error, or so conceals himself that such process cannot be served upon him.

8. In actions or proceedings under Chapter 371, Wyoming Compiled Statutes, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when a defendant is a non-resident of the state.

9. In suits for divorce, for alimony, to affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a non-resident of the state or conceals himself or herself in order to avoid service of process.

10. In all actions or proceedings which involve or relate to the waters, or right to appropriate the waters of the natural streams, springs, lakes or other collections of still water within the boundaries of the state, or which involve or relate to the priority of appropriations of such waters, including appeals from the determination of the state board of control, and in all actions or proceedings which involve or relate to the ownership of irrigating ditches situated wholly or partly within this state, when the defendant, or any of the defendants are non-residents of the state.

The three sections referred to in paragraph 1 above are the following (R. 11):

Sec. 5609, Brought Where Property is Situated When. Actions for the following causes must be brought in the county in which the subject of the action is situate, except as provided in the next two sections:

1. For the recovery of real property, or of an estate or interest therein.

2. For the partition of real property.

3. For the sale of real property under a mortgage, lien or other incumbrance or charge.

Sec. 5610. When Property is Situated in Several Counties. When property is situated in more than one county, the action may be brought in either; but in actions to recover real property this can only be done when the property is an entire tract.

Sec. 5611. Specific Performance. An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants, or any of them, reside.

Section 5641, Wyoming Compiled Statutes 1920, now Section 89-822, Wyoming Revised Statutes 1931 (R. 14), provides:

"In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

APPENDIX B.

Wyoming Statutes Relating to Vacation, Modification or Correction of Judgments and Decrees and the Time Within Which Such Proceedings Must be Taken.

Section 5923, Wyoming Compiled Statutes 1920, now Section 89-2301, Wyoming Revised Statutes 1931 (R. 106-108), provides:

> "A district court may vacate or modify its own judgment or order, after the term at which the same was made: * * *
>
> "(2). By a new trial granted in proceedings against defendants, constructively summoned, as provided in Sec. 89-817;
>
> "(3). For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order;
>
> "(4). For fraud practiced by the successful party in obtaining a judgment or order."

Section 5926, Wyoming Compiled Statutes 1920, now Section 89-2304 Wyoming Revised Statutes 1931 (R. 106-108), provides:

> "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment order, shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action; but the motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term."

Section 5927, Wyoming Compiled Statutes 1920, now Wyoming Revised Statutes 1931, Sec. 89-2305 (R. 106-108), provides:

"The proceedings to vacate the judgment or order on the grounds specified in subdivisions four, five, six, seven, eight, nine and ten of Section 89-2301, shall be by petition, verified by affidavit setting forth the judgment or order, the grounds to vacate or modify it, and if the party applying was defendant, the defense to the action, and on such petition a summons shall issue and be served as in the commencement of an action."

Section 5932, Wyoming Compiled Statutes 1920, now Wyoming Revised Statutes 1931, Sec. 89-2310 (R. 106-108), provides:

"Proceedings to vacate or modify a judgment or order for the causes mentioned in subdivisions four, five, and seven of Section 89-2301, must be commenced within two years after the judgment was rendered, or order made, unless the party entitled thereto is an infant or a person of unsound mind, and in cases of such disability, within two years after the removal thereof; proceedings for the causes mentioned in subdivisions three and six of the same section shall be commenced within three years, and in subdivision nine within two years after the defendant has notice of the judgment."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NO. [redacted] 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,
Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NO. 978

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURT BELOW

The first opinion of the Colorado Supreme Court is reported under the style of Meyer v. Milliken, et al., 101 Colo. 564-586, 76 Pac. (2d) 420 (See also R. 211-237). The second opinion of that court in this cause has not as yet been officially reported but may be found at pages 239-246 of the record and in the Pacific Reporter advance sheets for April 12, 1940, at page 151 (100 Pac. (2d) 151).

JURISDICTION

The petition for Writ of Certiorari is presented under Section 237(b) of the Judicial Code as amended by Act of February 13, 1925, 28 U.S.C.A., Sec. 344(b).

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI FOR THE REASONS FOLLOWING:

1. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the question, and that it was actually decided or that the judgment as rendered could not have been given without deciding it, whereas it appears affirmatively from the record in this case that the Colorado Supreme Court rested its decision upon a non-Federal ground adequate to sustain it.

2. The record does not contain an authenticated or duly attested copy of the Wyoming Court record or of its decree or judgment.

3. The record does not disclose any substantial title, right, privilege of immunity claimed by petitioners, or either of them, that has been denied by the decisions of the Colorado Supreme Court.

4. The Wyoming Court decree is based upon constructive service (R. 9).

STATEMENT OF CASE

We desire to conform to paragraph 4 of Rule 27, but confess some difficulty in our endeavor to make

what we deem to be an intelligent statement without repeating portions of petitioners' "Statement of Facts."

R. D. Meyer, or Raymond D. Meyer, respondent's predecessor in interest, in his lifetime, and on August 31, 1922, entered into a written agreement with Transcontinental Oil Company, a Delaware corporation, to acquire oil and gas rights in and to lands in Moffat and Routt Countries, Colorado (R. 159), plaintiff's Exhibit "R" (but the page at which it was offered in evidence is not in the record), for which services he was to receive a one-sixteenth of the net profits from oil and gas operations and development conducted upon the properties, permits or leases which he would secure and assign to said Company, the lands being particularly described in a schedule attached to said agreement, which schedule is referred to in the agreement, but is not contained in the record.

Said Meyer secured certain lands as agreed, assigned them, or his interest in them, to said Company and in said lands is situated what is known as the "Moffat Pool," and certain of the lands so secured by said Meyer were lands belonging to the United States Government as to which lands he secured an oil and gas prospecting permit, and that agreement is witnessed as to its execution by the petitioner, W. B. Milliken (R. 163).

Thereafter and on June 21, 1923, said Company assigned and transferred to the petitioner, Texas Production Company, a one-half interest in said lands and said contract, and said Texas Production Company (R. 4) by said assignment agreed to and did develop certain of said lands and procured oil production, agreeing at the same time to fulfill the obligations of the assignor to said Meyer under the agreement between said Meyer and said Transcontinental Oil Company of August 31, 1922.

Following production, said petitioner William B. Milliken and his son, Carl, asserted that they owned a two-thirds interest in the Meyer-Transcontinental Oil Company agreement and made demand upon said Company for such an interest (R. 26) and following negotiations with Transcontinental Oil Company and on May 3, 1924 (R. 26), petitioner, W. B. Milliken, secured from said Company a written agreement whereby, being willing "to buy peace" (R. 26-29), it agreed to pay to said petitioner a one thirty-second of the production and at the same time and as a part of the same transaction petitioner and his son, Carl, assigned their every claim and demand previously asserted against said Meyer and also as against his one-sixteenth profits interest to said Company (R. 27).

Said petitioner thereafter received his one thirty-second of production and utilized it until about July 26, 1927, when he decided to repudiate his assignment to said Company and his agreement for the one thirty-second of production, and though living at that time in Denver, Colorado, as he had previously for years, instituted an action at Rawlins, Wyoming, in the District Court of Carbon County, against said Transcontinental Oil Company and said Meyer, charging them, as joint tort feasors, with conspiracy and fraud and sought an accounting and cancellation of his contract with said Transcontinental Oil Company (R. 7) and (R. 8) sought from said Company 17½ per cent of profits from said lands.

That on or about March 22, 1928, said petitioner by one of his attorneys, C. R. Ellery, made and on March 28, 1928, filed with the Clerk of said Court an "Affidavit for Constructive Service" on said Meyer (R. 9), charging that Meyer was a resident of Wyoming, living part of the time in Wyoming and part of the time in Colorado, and that he was remaining out of the State of Wyoming and concealing himself to avoid service of summons, though at the time of filing his petition in

July, 1927, which was verified by his said attorney, he alleged (R. 7)

> "that said defendant Meyer, in taking out certain permits in the name of said plaintiff covering unfavorably located lands within the Hamilton and Isles structures, showed plaintiff's address as being at 1114 Logan Street, Denver, Colorado, when in truth and in fact, said address was the residence of the said Meyer, and was not the address of said plaintiff, and this was well known to the said defendant."

Paragraph Ninth (R. 8) of respondent's complaint is the following:

> "Ninth. It is alleged said Meyer was not a resident of Wyoming on March 26, 1928, nor at any time thereafter to the date of his decease on August 17, 1935, nor at any time prior to March 26, 1928, and subsequent to the month of June, 1920, and that at no time following the month of June, 1920, did he live in the State of Wyoming, and that he did not remain out of the State of Wyoming nor conceal himself to avoid service upon him of the summons issued out of the District Court of Carbon County, Wyoming, but that at or about the month of June, 1920, he moved with family from the State of Wyoming with the intention of becoming and being a resident of Colorado and that at the date of his decease he resided with his family in the City and County of Denver in Colorado and during practically the entire period so resided at 1114 Logan Street, Apartment 7, in said City and County."

On March 30, 1928, Meyer was served with process in Denver, Colorado (R. 15), and made no appearance in response to the process, either general or special, neither in person nor by attorney (R. 16). The case subsequently being at issue as between said petitioner

and the alleged joint tort feasor Transcontinental Oil Company was tried on May 15, 1931 (R. 32), and on July 11, 1931, findings and decree were made and entered (R. 32-39).

By the decree the Court found and adjudged in favor of Transcontinental Oil Company and against said Milliken, dismissed the case as to said Company and awarded it judgment against Milliken for costs (R. 37), and at paragraph Second (R. 33) of decree recites,

> "that the written contracts set forth in the pleadings and proofs by and between the plaintiff and the Transcontinental Oil Company (sometimes herein called the Transcontinental Oil Company of Colorado) and bearing date of May 3, 1924, were entered into between said plaintiff and defendant corporation, and between said plaintiff and Carl S. Milliken on the one part and the said defendant corporation, in good faith on the part of said defendant corporation and for good consideration, and made, executed and delivered on the part of said plaintiff for good consideration and with full knowledge, and without any fraud, deception or conspiracy on the part of said defendant corporation, and was in good faith kept and performed by the said Transcontinental Oil Company, and that said plaintiff after the execution and delivery of said contract, accepted, benefitted by and ratified the said contract."

By the same decree the Wyoming Court defaulted said Meyer for failure to appear, plead or answer (R. 32) and found in favor of said Milliken that he was entitled to one-fourth of Meyer's one-sixteenth, a one sixty-fourth, and directed the entry of a judgment for more than $30,000.00 based upon the accumulation of one sixty-fourth net production from the date of production to the date of directing the said entry, made

further findings in favor of said Milliken and against Meyer as to the one sixty-fourth net production, enjoined Meyer from receiving and Transcontinental Oil Company from paying the one sixty-fourth to Meyer after the Transcontinental Oil Company had been dismissed out of the case and "With Prejudice," though the producing lands were, as shown by Exhibit "R," in the State of Colorado and had not been, nor was any attempt even made to, by any remedial process, bring the property of Meyer within the jurisdiction of the Court or under its control; that having made the findings as to the one sixty-fourth as stated, it did not adjudge or even assume to adjudge the one sixty-fourth to Milliken or to any person for him, or to any other person or Company, nor away from Meyer (R. 32-39).

The petitioner, the Ohio Oil Company (R. 6), after acquiring the remaining one-half interest of Transcontinental Oil Company in the Colorado lands and in the agreement, Exhibit "R," between said Meyer and Transcontinental Oil Company, became a joint owner with the petitioner Texas Production Company and agreed with said Transcontinental Oil Company to perform its obligations set forth in the Meyer-Transcontinental Oil Company agreement, and following that status (R. 6) it received from Texas Production Company its proportion of the profits interest which belonged to Meyer and refused and still refuses to pay to Meyer, or respondent, the one-fourth of the one-sixteenth profits interest that, as stated above, was never adjudged away from Meyer.

That thereafter the petitioner, Margaret M. Milliken, the wife of petitioner, William B. Milliken, claiming to be the assignee of the judgment secured by him in the Wyoming Court, against Meyer, made demand upon petitioner, The Ohio Oil Company, to make payment to her of the monies representing said one sixty-fourth net profits production, which petitioner, The Ohio Oil Company, had withheld from said Meyer, and

on or about March 16, 1935, the petitioner, The Ohio Oil Company, acting in its own behalf and for petitioner, Texas Production Company, in response to the demand of said petitioner, Margaret M. Milliken, paid to her of the said money so withheld, $4,355.49 and thereafter made additional payments from the one sixty-fourth so withheld, totaling an aggregate of $4,829.49 (R. 70), which money (R. 70) it alleged it had been retaining in a special account from the production of said "Moffat Pool."

Following Meyer's decease on August 17, 1935, respondent, pursuant to the order of the Probate Court having jurisdiction of his estate, instituted an action in equity (R. 2) against the petitioners to have decreed *void* and a *nullity* the decree of the District Court of Carbon County, Wyoming, as to said Meyer; also for injunctive and other relief, alleging among other things,

Paragraph Twenty-seventh (R. 55) the following:

> "That the judgment and decree of the District Court of Carbon County, Wyoming, was and is as to said R. D. Meyer, deceased, as a defendant, in said action in said Carbon County Wyoming Court, absolutely void as having been rendered by said Court without jurisdiction of the person of said deceased and without jurisdiction of his property, which by its decree it assumed to impound, and does not even follow nor conform to, but contravenes the findings of the Court as set forth in said decree, and if said judgment be allowed to stand and be made effective as to said R. D. Meyer, it will cause plaintiff irreparable injury."

Paragraph Twenty-eighth (R. 55) the following:

> "That due process of law did not and has not obtained in said action."

and paragraph Twenty-ninth of respondent's complaint (R. 55) alleges that the judgment rendered by the Wyoming Court is in violation of the constitution of the State of Wyoming, Sec. VI, Article I thereof, and is in violation of that portion of Article XIV, Section 1, of the Constitution of the United States which says, "nor shall any state deprive any person of life, liberty or property without due process of law," and contravenes and violates as well Article V of the Amendments to the Constitution of the United States.

Milliken in his joint answer with his wife, Margaret M. Milliken, who is claiming as his assignee, filed their answer (R. 103) wherein he admits that he resided in Denver, Colorado, at the time of instituting his action in the Wyoming District Court.

Said action by respondent, both individually and as Administratrix with the will annexed of the estate of said Meyer, following trial in the Colorado trial court was dismissed by said Court for want of equity (R. 143), the trial court saying,

> "For the foregoing reasons I find the issues joined in favor of the defendants and each of them and against the plaintiff. I find there is no equity in the bill. The bill should be dismissed. The bill is dismissed."

The judgment order of the trial court so dismissing the bill is at R. 143.

Upon Writ of Error from the Colorado Supreme Court the judgment of the Colorado trial court was reversed; see Colorado report, 101 pp. 564-586, 76 Pac. (2d) 420 (R. 211-237); and was remanded to the Colorado trial court with directions (R. 168-170) where the trial court refused to sign the judgment order presented by respondent's attorney but signed the one presented by petitioner's attorney, whereupon respond-

ent again went to the Colorado Supreme Court on Writ of Error, and that Court affirmed the judgment order so signed by the trial court and held, among other things, that "the error, if any there were, is clearly harmless," and adhered to its former decision. The cross errors assigned by petitioners having been overruled by the Colorado Supreme Court (R. 239-246) the petitioners are seeking a review. The last opinion of the Colorado Supreme Court, being as yet not officially reported, may be found at pp. 239-246, Pacific Reporter Advance Sheets for April 12, 1940, and at page 151 of 100 Pac. (2d).

SUMMARY OF ARGUMENT

1. Although a Federal question has been raised by petitioners, the decisions of the Colorado Supreme Court are rested upon a non-Federal ground sufficient to sustain them.

2. The failure of the record to contain an authenticated copy (or duly attested copy) of either the Wyoming decree or of the record of procedure in the Wyoming Court deprives the United States Supreme Court of jurisdiction to review.

3. The Wyoming Supreme Court was without jurisdiction of respondent's predecessor in interest, R. D. Meyer, now deceased, or of his property which was located in the State of Colorado.

4. Judgments based upon constructive service may not be reviewed in virtue of the full faith and credit clause of the Federal Constitution, Article IV, Section 1.

ARGUMENT

I.

JURISDICTION

THE UNITED STATES SUPREME COURT is without jurisdiction to grant a Writ of Certiorari for the reasons following:

Reading from Lynch, et al., v. New York, 293 U. S. 52-55, 79 L. ed. 191, a case wherein the State Tax Commission determined that rental received by a resident of New York from real property situated in the State of Ohio should be included as a part of her income. She sought a review by the Supreme Court of New York, invoking rights under the Constitution and laws of New York and under the Fourteenth Amendment of the Constitution of the United States. The appellate division of the New York Court annulled the determination of the State Tax Commission and that Court, while citing decisions of the United States Supreme Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of New York affirmed the order of the appellate division but without opinion, the grounds of its decision were left to conjecture and it is said by this court:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are no part of the record.
>
> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of

> the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

And it is then said by this Court:

> "Where the judgment of the State court rests on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

In the case at bar it decisively appears that while a Federal question is raised by petitioners, the decisions of the Colorado Supreme Court were rested wholly and solely upon a non-Federal ground. Jud. Code, Sec. 237(b), 28 U.S.C.A. Sec. 344(b); McGoldrick, Comptroller of City of New York v. Gulf Oil Corporation, 84 L. ed., Advance Opinions, No. 6, p. 336; Honeyman v. Hanan, 300 U. S. 14-26, 81 L. ed. 477; City of New York v. Central Savings Bank, 306 U. S. 661, 83 L. ed. 1058, 59 S. Ct. 790.

II.

THE COLORADO SUPREME COURT RESTED ITS DECISION ON A NON-FEDERAL GROUND ADEQUATE TO SUSTAIN IT.

In connection with the subject under discussion, we are assuming at this time to quote at some length (a little more than four pages) from the opinion of the Colorado Supreme Court, Meyer v. Milliken, et al., 101 Colo. 564-586, 76 Pac. (2d) 420 (R. 230-234), a lengthy opinion, but which we feel may tend to a

saving of this Court's time as against the time we might occupy in our deductions, interpretations and comment thereon, which quotation from the Court's opinion is the following:

> "So many interesting questions are rarely presented as are disclosed by the record in this case, and we have an outstanding example of an attempt by each party to rely upon the weakness of the other's cause of action or defense, instead of the strength of his or its position. The authorities tend to support, and we find merit in both the cause of action and the defenses thereto. Equity therefore requires that the substance of this controversy controls rather than exactness of form. With this in view, we need not concern ourselves with the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter in the case before it, which we do not decide. We content ourselves with a discussion of the effect of the judgment there entered. Concerning the one sixty-fourth interest in the profits of production from the lands involved, it is not disputed that Meyer acquired such interest through and under the contract of August 31, 1922, between himself and the Transcontinental Oil Company. The only person or persons shown to have ever claimed any part of this interest were Milliken and his son, Carl S. It is in no way controverted that on May 3, 1924, the Millikens for a valid consideration, then received and retained by them, sold and assigned, not only this particular interest, but any and all claims of every nature they had against Meyer in connection with all lands here involved or the proceeds from the operations thereon, to the Transcontinental Oil Company. This contract of sale, and the assignment thereunder, was found by the Wyoming Court under its decree to be valid. The only

suggestion of any basis for an action by Milliken against Meyer, rested upon the claim before its assignment. A study of the Wyoming decree and judgment discloses a full and complete adjudication of Milliken's claim by its finding that he had validly assigned it. This finding deprived the court — and incidentally Milliken — of any basis upon which it could predicate the judgment it later, and by the same decree, entered against Meyer. A judgment must have basis for its existence as a valid judgment. In this connection, it is significant to note that in the Wyoming decree and judgment, there is no judgment against Meyer or in favor of any of the defendants in the action now before us or in any other action shown by the record, for the one sixty-fourth of the net production from the lands involved. It is not disputed that this interest was the property of Meyer in his lifetime and descended to plaintiff in error. It was never transferred by him, or anyone for him, or alienated from him in any way, or taken from him by the decree or judgment of any court. When the Wyoming court entered a personal judgment against Meyer in favor of Milliken, whom it found had transferred and assigned his every claim against Meyer, it recorded an irreconcilable contradiction of the terms of the finding and decree, and these are so inconsistent as to result in a mere nullity, and particularly the judgment rendered in favor of Milliken and against Meyer. There is no precedent based upon sound legal or equitable principles which will warrant an approval by us of a judgment based upon an alleged cause of action which by judicial ascertainment it is established had been sold and assigned by the plaintiff to another for a valid consideration. Such is the glaring result appearing in the Wyoming judgment upon its

face. Our conclusions are not the result of a technical construction of the decree when read and considered as a whole. The decree in no way otherwise gave any intimation that Milliken was entitled to the benefits derived from the thing he had sold. It made no disposition of the one sixty-fourth interest which stands now, as it always stood, for the use and benefit of Meyer and his successors. Of necessity this was as apparent to the Ohio Oil Company as it is to us, because its counsel participated in the Wyoming trial, was familiar with the decree and judgment therein entered, and was at all times conversant with the effect of such decree. It cannot now deny its construction of the decree in face of its answer filed herein; notwithstanding, without any right or authority it paid the money here in question to Margaret Milliken out of the one sixty-fourth interest shown to have been still remaining in Meyer. In its answer herein, the Ohio Oil Company alleged the contract between Milliken and the Transcontinental Oil Company whereby Milliken and his son jointly and severally sold to that company all and singular the rights, interests, claims and demands of every kind or nature which they had against R. D. Meyer in anywise pertaining to any and all lands in Colorado, or the one-sixteenth interest of Meyer therein, and that one-sixteenth included the one sixty-fourth interest now in dispute. It further alleged that the Millikens were estopped thereby to make any claims against it as to the said one sixty-fourth interest; that they were not entitled to any part thereof; that the payments made by it to Margaret Milliken covering the one sixty-fourth interest were made, through a mistake of fact, to the wrong person without any consideration from Margaret Milliken and because of "forget-

fulness" of said agreement of May 3, 1924, when nothing was due or owing Margaret Milliken or William Milliken under any contract; that in equity and good conscience this money should be repaid to it by the Millikens. The Millikens filed no answer to this cross-complaint, and we have no intimation of their position with reference thereto, other than the opening statement of their counsel at the time of trial to the effect that so far as the cross-complaints of the Ohio Oil Company and the Texas Production Company are concerned, counsel was willing to stipulate that one or the other of the oil companies is entitled to a judgment against the Millikens in the event the court should enter judgment in favor of the plaintiff against either of the oil companies. In this equitable action, it is not a matter of the courts of this state being concerned about the full faith and credit of constitutional provisions relative to judgments of a sister state, the important question being as to the effect of the judgment of a sister state—palpably void on its face—upon the rights of citizens of this state who are parties to the equitable cause of action in this state. A court of this state unquestionably has the power to enjoin the enforcement of such a foreign judgment between the citizens of this state who are before the court and in the state.

"The plaintiff herein was, and is, entitled to maintain this equitable action, it appearing that her property rights have been invaded by reason of her being deprived of money due or to become due her by virtue of a judgment which, in so far as it purports to be effective against her, is void on its face because pronounced by a court which had deprived itself of jurisdiction to enter the particular judg-

ment against Meyer. Judgments must conform to the findings of the court in such a substantial particular. Bartlett v. Hammond, 76 Colo. 171, 230 Pac. 109. Applying this rule, the judgment of the Wyoming court, in order to comply with the finding of the court by the same decree, would have been one of dismissal of the cause of action against Meyer, because the court already had found that any claim Milliken had ever had or made against Meyer, had been by him sold and assigned to the Transcontinental Oil Company, leaving him without a cause of action against Meyer."

III.

THE RECORD DOES NOT CONTAIN AN AUTHENTICATED COPY OF THE WYOMING PROCEEDINGS AND NOT EVEN OF ITS DECREE OR JUDGMENT.

The authentication is required by R. S. Sec. 905, Title 28 U.S.C.A., Sec. 687 (Appendix A) or such an authenticated or attested record as is provided for by Wyoming Rev. Stat., 1931, Sec. 89-1732 (Appendix B).

While the Colorado Supreme Court considered the Wyoming decree, a failure of the record to contain an authenticated copy deprives this Court of jurisdiction to review the decisions of the Colorado Supreme Court under the full faith and credit clause of Article IV, Section 1, of the United States Constitution.

Both Federal and State courts uniformly require that a judgment of a sister state to constitute competent evidence when offered as such in a proceeding in another state must be authenticated either in compliance with the Act of Congress prescribing the manner which will entitle a judicial record so authenticated

to consideration under the full faith and credit clause, of Article IV, Section 1, or in compliance with the Statutes of the State in which the judgment is rendered, and in the absence of any authentication jurisdiction, to review under the constitutional provision, is lacking.

The Supreme Court of the United States has uniformly held that the Act of Congress prescribing the manner of authentication of a judicial record indicates clearly that only such records or procedings as are so authenticated are entitled to have full faith and credit given to them in the courts of other states within the United States as they have by law or usage in the courts of the state in which they are obtained.

The fact that the Wyoming judgment was admitted in evidence without authentication does not constitute a compliance with this requirement and there being no authentication, there is no power of review. Richard Christmas, Plaintiff in Error v. John W. Russell, etc., 72 U. S. 290, 18 L. ed. 475; Allen T. Caperton, Plaintiff in Error, v. William A. Ballard, Admr., 81 U. S. 238; 20 L. ed. 885. John Turnbull, Jr., Plaintiff in Error, v. Joseph R. Payson, Defendant in Error, 95 U. S. 418, 24 L. ed. 437; Mills v. Duryee, 7 Cranch 481, 3 L. ed. 411; Michael Hanley, et al., Plaintiffs in Error, v. Charles Donoghue, 116 U. S. 1, 29 L. ed. 535.

IV.

THE RECORD DOES NOT DISCLOSE ANY SUBSTANTIAL TITLE, RIGHT, OR PRIVILEGE OF IMMUNITY CLAIMED BY PETITIONERS, OR EITHER OF THEM, THAT HAS BEEN DENIED BY THE DECISIONS OF THE COLORADO SUPREME COURT.

The Wyoming decree which is the basis of petitioners' application for review is grounded upon con-

structive service. A decree based upon such service does not furnish the basis of a claim of right, title, privilege or immunity subject to review under Article IV, Section 1, of the Federal Constitution and could not be the basis of asserting a claim in a sister state as the court hearing the Wyoming cause based upon constructive service had authority only to make its judgment effective as to the res, if any, located within the territorial jurisdiction of the Wyoming court. John W. Haddock v. Harriet Haddock, 201 U. S. 562, 50 L. ed. 687; McDonald, et al., v. Mabee, 243 U. S. 90-93, 61 L. ed. 608 (at page 610, last half of left hand column).

V.

THE WYOMING DECREE IS BASED UPON CONSTRUCTIVE SERVICE AND MAY NOT BE REVIEWED UNDER FULL FAITH AND CREDIT PROVISIONS OF THE FEDERAL CONSTITUTION.

Hart v. Sansom, 110 U. S. 151-156, 28 L. ed. 101. An action by Hart, a citizen of Louisiana, to reverse a judgment rendered against him in the circuit court of the United States for the northern district of Texas, and wherein service had been had upon Sansom by publication. Reading from the opinion, beginning third line from bottom, left hand column of page 103, it is said:

> "Such a decree being in *personam* merely, can only be supported against a person who is not a citizen or resident of the state in which it is rendered by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the state might, perhaps, feel bound to give effect to the service made as directed by its statutes but no court deriving its authority from another government will recognize a

merely constructive service as bringing a person within the jurisdiction of the court. The judgment would be allowed no force within the courts of any other state; and it is of no greater force as against a citizen of another state in a court of the United States, though held within the state in which the judgment was rendered."

VI.

RESPONDENT'S ATTACK UPON THE WYOMING JUDGMENT IS DIRECT AND NOT COLLATERAL.

Atchison, Topeka & Santa Fe Railway Co. v. Commissioners, et al., 95 Colo. 435, 37 Pac. (2d) 761. The statement by counsel for petitioners that the action by respondent was a collateral attack is not sustained by the facts in this case as the action instituted by respondent is one in equity to have the Wyoming judgment decreed *void* and a *nullity;* also for injunctive and other relief.

The case of Atchison, Topeka & Santa Fe Railway Co. v. Edmund R. Wells and his counsel, 265 U. S. 101, 68 L. ed. 928, is one wherein Wells, an employee of said Railway Company, a citizen and resident of Colorado, was injured while performing his duties in New Mexico. He sued the Company in a state court but could not make personal service upon it within that state and proceeded by garnishment and constructive service to impound some property and money belonging to said company, which did not appear at the trial and judgment was rendered against it by default for $4,000.00 and costs.

The action was one

"to enjoin the enforcement of these judgments suit was brought by the Santa Fe in the Federa

Court for Western Texas against Wells, who had meanwhile become a resident of that state, and his counsel. The case was heard upon agreed facts and a decree dismissing the bill was affirmed by the United States Circuit Court of Appeals for the fifth circuit.

About the middle of the right hand column, at page 931, it is said:

> "Relief against the void judgments entered was properly sought by the Santa Fe in the Federal court."

citing cases, and the judgments of the lower courts were reversed.

VII.

THE WYOMING COURT WAS WITHOUT AUTHORITY TO ENTER A VALID JUDGMENT IN FAVOR OF PETITIONER WILLIAM B. MILLIKEN AND AGAINST RESPONDENT'S PREDECESSOR IN INTEREST, R. D. MEYER.

This record discloses that more than three years prior to the institution of his action in Wyoming, Milliken had sold and assigned his alleged claim against Meyer to Transcontinental Oil Company, and having so sold and assigned it had no basis for an action remaining. National Exchange Bank of Tiffin, Ohio, v. Wiley, 195 U. S. 257-270, 49 L. ed. 184-190, where this court says:

> "The general jurisdiction of the Ohio Court undoubtedly embraced such a cause of action as was set forth in the suit on the note but we are of the opinion that that court had no authority or jurisdiction to render judgment against the obligors of the National Exchange Bank if the National Exchange Bank had in fact sold the

note and ceased before the commencement of that suit to own it or to be entitled to receive the proceds to its own use. It was in such case, in legal effect, a personal judgment without service of process upon the defendant and without the appearance in person or by an authorized attorney. The proceedings are wanting in due process of law."

In the case at bar, it is admitted by the petitioners that Milliken had long prior to the institution of his action in Wyoming assigned his every alleged or asserted claim against Meyer to Transcontinental Oil Company.

VIII.

THE ONE SIXTY-FOURTH (1/64) INTEREST IN THE OIL PRODUCED FROM THE LANDS PROCURED BY R. D. MEYER FOR TRANSCONTINENTAL OIL COMPANY WAS NOT ADJUDGED TO ANY OF THE PETITIONERS, OR ANY OTHER PERSON. BY THE WYOMING COURT DECREE.

The foregoing statement being admitted by the petitioners needs no citations of authorities.

IX.

THE EQUITABLE ACTION INSTITUTED BY RESPONDENT IS IN ACCORDANCE WITH AUTHORIZED PROCEDURE.

In support of that statement we cite Atchison, Topeka & Santa Fe Railway Company v. Wells, et al., 265 U. S. 101, 68 L. ed. 928.

X.

SECTION 5641 OF WYOMING COMPILED LAWS, 1920, DID NOT AND DOES NOT EVEN PURPORT TO AUTHORIZE A JUDGMENT IN PER SONAM.

Appendix E (R.14) under the subject, "Constructive Service;" the first section under said subject being 5636 (R. 10), provides for service by publication and recites the numerous cases in which publication is available and which discloses that the actions which may be so brought are in proceedings in rem, and Sec. 5641 reads, as to the material portion thereof, under the subject, "Personal Service Out of State:"

> "Sec. 5641. Personal Service Out of State. In a case where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state,"

and it requires something aside from stated facts to disclose that such service authorized or authorizes a judgment in per sonam against one so served.

XI.

THREE ELEMENTS CONSTITUTE THE JURISDICTION OF A COURT.

State ex rel, Yohe v. District Court of 8th Jud. Dist., Natrona County, 35 Wyo. 281, 238 Pac. 545-557. An original proceeding in the Wyoming Supreme Court wherein the Court's jurisdiction was involved, it is said that in addition to jurisdiction of the person and the subject matter, the procedure followed by the Court and the methods by which the judgment was obtained

must conform to the forms and practice of the Court, and cites, with approval, the case of People v. Burke, 72 Colo. 486-512, wherein it is said at page 504:

> "Jurisdiction, in its fullest sense, is not restricted to the subject matter and the parties. If the Court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the Court had jurisdiction of the parties and of the subject matter."

Citing cases, among which is Windsor v. McVeigh, 93 U. S. 274.

In re John Bonner on Petition for Writ of Habeas Corpus, 151 U. S. 242-262, 38 L. ed. 149.

This record discloses conclusively that the property of respondent's predecessor in interest, which was impounded by the Wyoming decree was at all times in the State of Colorado without the jurisdiction of the Wyoming Court and at no time was it by any remedial process attempted even to be brought within the jurisdiction of the Court or under its control.

The power of a court is not without limitation but is circumscribed by the law and does not extend to the arbitrary exercise of a mere determination to do and the doing of something contrary to law and natural justice.

Equity does not sanction wrong doing nor knowingly permit a wrong doer to profit by his wrong.

It is fundamental, and we may add elementary, that the law of a case is the law applicable to the facts of the particular case.

WHEREFORE, it is respectfully submitted that

jurisdiction to review on Certiorari is lacking and the petition should therefore be denied.

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APPENDIX

A.

Title 28 U.S.C.A., Section 687, R. S. Section 905,

"Authentication of legislative acts; proof of Judicial proceedings of State.

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such State, Territory or country affixed thereto. The records and judicial procedings of the court of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. (R. S. Sec. 905.)"

B.

Section 89-1732, Wyoming Revised Statutes, 1931,

"Certified copies of records as evidence.

"A certified copy of any paper or record under the hand and seal of the officer who, by the laws of this state, has the legal custody of such paper or record shall be competent evidence in any court to prove, and shall be prima facie evidence of, the contents of such paper or record. Copies of any books, records, papers, or

documents in any of the executive departments of the United States, authenticated under the seals of such departments, respectively, shall be admitted as prima facie evidence of the originals thereof. (L. '27, c. 68, Sec. 1, amending L. '23, c. 55, Sec. 1.)"

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C. Actual Service

"Sec. 5628. Service and Return of Summons. The service shall be by delivery at any time before the return day, of a copy of the summons with the indorsements thereon, together with a copy of the petition to the defendant personally, or by leaving a copy of the summons and petition at his usual place of residence with some member of his family, or other person in his employ over the age of fourteen years, * * * "

D. Constructive Service

"Sec. 5636. Service by Publication. Service by publication may be had in either of the following cases:

* * * * *

"6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."

E. Personal Service Out of State

"Sec. 5641. Personal Service Out of State. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state,"

F.

Black on Judgments, Vol. 1, 2d ed., Sec. 186:

"Judgment must follow verdict." * * * "The judgment to be valid must follow it and accord with it."

G.

Black on Judgments, Vol. 2, 2d ed., Sec. 781:

Successful Defense by one Joint Trespasser.

"In action of tort, where the wrong is joint and several, and the plea of one of the defendants is such as shows that the Plaintiff could have no cause of action against any of them, if the plea is found against the plaintiff, it operates to the benefit of all the defendants."

H.

Black on Judgments, Vol. 2, 2d ed., Sec. 901:

Record may be Contradicted. Says in part,

"It is fair to infer that the Constitution means nothing more than that full faith and credit shall be given to the valid and lawful judgments of the courts of a sister state."

I.

Corpus Juris, Vol. 34, Sec. 788. Relief Awarded.

"On a bill for an injunction against a judgment at law, properly framed, the court has authority to grant the parties any and all relief to which they may appear to be entitled, although the decree should not go beyond the prayer of the petition or bill. Such relief includes the vacation or annulment of the judgment, or a perpetual injunction against its enforcement, and the restitution of money already collected on it, or damages for the attempted or successful enforcement of the judgment by execution."

J.

Corpus Juris, Vol. 34, Sec. 1615(b). Presumption in Favor of Jurisdiction.

"In an action on a judgment recovered in another state, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject matter and the parties, in the absence of proof to the contrary. But this rule does not apply where the defendant was a non-resident of the state where the judgment was rendered or is shown to have been absent from that state at the commencement of the action."

K.

Corpus Juris, Vol. 34, Sec. 1616(c). Extrinsic Evidence as to Jurisdiction—aa. to Show Want of Jurisdiction.

"The rule that a judgment cannot be collaterally attacked, unless a want of jurisdiction appears on the face of the record, does not apply to a foreign judgment."

L.

Freeman on Judgments, Sec. 353(a), 5th ed.—beginning twelfth line from bottom of page 732:

"The dismissal of a cause ousts the court of jurisdiction and thereafter it has no power to render an order or judgment in the cause or take any further action therein, until the order of dismissal is vacated, except as it may be necessary to close the litigation. And, if a judgment is rendered after dismissal, without first vacating or setting aside the dismissal order, so as again to bring the parties into the cause, such judgment is void."

M.

Freeman on Judgments, Sec. 308, 5th ed.—beginning second line from top of page 616; says:

"A suit to set aside a judgment does not cease to be a direct attack because relief is also asked from a sale and conveyance made under it, since the latter relief is only incidental."

N.

15 R.C.L., paragraph 193. Relief as to Void and Irregular Judgments. Beginning near bottom of page 738 reads:

"The general rule appears to be that a court of equity in a proper case will interfere where the irregularities or errors are of such character as to make the judgment ipso facto void, and it has been held that it makes no difference that the parties could obtain relief at law."

O.

Williams v. Hawkins, 75 Colo. 136:

"Jurisdiction includes not only the power to hear and determine a cause but to enter and enforce a judgment. If there is no right in the court to enter the particular judgment entered, the entry is without jurisdiction." * * * "The court points out that, if a court, having jurisdiction of the parties and the subject matter, renders a judgment in which it transcends the power conferred by law, in so doing, it acts without jurisdiction and its judgment is void."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 66
(formerly No. 978)

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

JURISDICTION

The Wyoming Court was without jurisdiction of either R. D. Meyer or his property which was at all the times herein refered to in the State of Colorado.

Respondent in her complaint in this action (R. 55) pleaded paragraph "Twenty-seventh," as follows:

> "Twenty-seventh:
>
> "That the judgment and decree of the District Court of Carbon County, Wyoming, was and is as to said R. D. Meyer, deceased, as a defendant, in said action in said Carbon County, Wyoming, Court absolutely void as having been rendered by said Court without jurisdiction of the person of said deceased and without jurisdiction of his property, which by its decree it assumed to impound, and does not even follow nor conform to, but contravenes the findings of the Court as set forth in said decree, and if said judgment be allowed to stand and be made effective as to said R. D. Meyer, it will cause plaintiff irreparable injury."

Respondent does not deem any additional Statement of Case necessary.

CONSTRUCTIVE SERVICE OF PROCESS AS AUTHORIZED BY WYOMING COMPILED STATUTES DOES NOT AND DOES NOT EVEN PURPORT TO AUTHORIZE THE RENDITION OF A JUDGMENT IN PERSONAM BASED UPON SUCH SERVICE.

Counsel for petitioners, in their brief, at page 6, present two questions and as to the first one submitted they fail to correctly state the basic facts upon which the Colorado Supreme Court based its decision and, therefore, say that the Colorado Court refused to give full faith and credit to a Wyoming judgment; whereas, the Colorado Supreme Court, as set forth in our original brief to which we refer and adhere, says that it did not consider the case from the standpoint of a Federal question being involved such as counsel have at all times attempted to inject into the case, but that its decision was and is one in *equity*, based upon

the facts which it has stated in its opinion and as set forth by respondents at pages 13 to 17, original brief.

They then ask:

> "Did the Wyoming Court have jurisdiction to render a judgment in personam upon the service of process in Denver, Colorado, on a defendant whose domicile was in the State of Wyoming?"

to which we answer no, though the question as to the domicile of the defendant, R. D. Meyer, in that action is one in dispute (R. 8) paragraph "Ninth" of the complaint.

At the same page, paragraph 3, they say:

> "A judgment in personam may be given by a Wyoming Court upon personal service of process outside of the State on a resident of Wyoming who has concealed himself to avoid the service of process,"

which is an assumption without support. They then cite certain cases and Restatement of The Laws of Conflict of Laws, Sections 77, 79, none of which, we respectfully submit, lend support to what they have said.

Section 5641 of the Compiled Statutes of Wyoming for 1920 is quoted in the Appendix in our previous brief and designated by the letter E, page 27, and reads:

> "In a case where service may be made by publication under the provisions of this Chapter, personal service of a copy of the summons and petition in said action may be made out of the state."
>
> * * *

The service secured in the Wyoming case upon the defendant Meyer was and is admittedly "constructive" (R. 9 and 46).

The subject matter of Chapter 359, Wyoming Compiled Statutes, 1920, is "Commencement of Actions—Service."

Embraced in said Chapter are Articles, I and II, the first of which pertains to "ACTUAL SERVICE" and is Section 5628 of said Statutes, reading as follows:

> "Sec. 5628. Service and Return of Summons. The service shall be by delivery at any time before the return day, a copy of the summons with the indorsements thereon, together with a copy of the petition to the defendant personally, or by leaving a copy of the summons and petition at his usual place of residence with some member of his family, or other person in his employ over the age of fourteen years, * * *"

Article II pertains to "CONSTRUCTIVE SERVICE" and is the following:

> "Sec. 636. Service by Publication. Service by publication may be had in either of the following cases:
>
> "1. In actions under the first three sections of the last preceding chapter, when the defendant resides out of the state, or his residence cannot be ascertained."

which said three sections are as follows:

> "1. For the recovery of real property, or of an estate or interest therein.
>
> "2. For the partition of real property.
>
> "3. For the sale of real property under a mortgage, lien or other incumbrance or charge."

> "2. In actions to establish or set aside a will, where the defendant resides out of the state, or his residence cannot be ascertained.

"3. In actions in which it is sought by a provisional remedy to take, or appropriate in any way, the property of the defendant, when the defendant is a foreign corporation, or a non-resident of this state, or the defendant's place of residence is unknown, and in such actions against a corporation, incorporated under the laws of this state, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made as provided by section 5631 and which has no place of doing business in this state.

"4. In actions which relate to, or the subject of which is real or personal property in this state, when a defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state, or a foreign corporation, or his place of residence cannot be ascertained.

"5. In actions against executors, administrators or guardians, when the defendant has given bond as such in this state, but at the time of the commencement of the action is a non-resident of the state, or his place or residence cannot be ascertained.

"6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent.

"7. When a defendant in a petition in error has no attorney of record in this state, and is a non-resident of, and absent from the same, or has left the same to avoid the service of a summons in error, or so conceals himself that such process cannot be served upon him.

"8. In action or proceeding under Chapter 371, Wyoming Compiled Statutes, or to impeach a judgment or order for fraud, or to obtain an order of

satisfaction thereof, when a defendant is a non-resident of the state.

"9. In suits of divorce, for alimony, to affirm or declare a marriage void, or the modification of any decree therefor entered in such suit, when the defendant is a non-resident of the state or conceals himself or herself in order to avoid service of process.

"10. In all actions or proceedings which involve or relate to the waters, or right to appropriate the waters of the natural streams, springs, lakes or other collections of still water within the boundaries of the state, or which involve or relate to the priority of appropriations of such waters, including appeals from the determination of the state board of control, and in all actions or proceedings which involve or relate to the ownership of irrigating ditches situated wholly or partly within this state, when the defendant, or any of the defendants are non-residents of the state."

Designates the various kinds of actions wherein service of summons may be made by publication, and it will be observed that the coverage is of proceedings *in rem*, and said Section 5641 authorizing Personal Service Out of State specifically provides that service of a copy of the summons and the petition may be made *only in cases where publication of summons may be had.*

As further showing, as we contend, that said Section 5641, Wyoming Compiled Statutes, authorizing personal service of a copy of the petition and copy of the summons on a defendant outside the state does *not* authorize the rendition of a judgment in personam and does not even *purport* to authorize such a judgment to be rendered, see (R. 113) Mechanic's and Builder's Liens, Section 4870, Wyoming Compiled Statutes, 1920, the subject of which is "PARTIES TO ACTION—Constructive Service" (R. 114), which is the following:

> "In all suits under this chapter the parties to the controversy shall, and all persons interested in the matter in controversy, and in the property charged in the lien, may be made parties, but such as are not made parties shall not be bound by any such proceeding and constructive service may be had upon any defendant in suits brought under this chapter who may be non-residents of the state and cannot be personally served with the summons within the state in the same manner as constructive service is had in other cases at law."

We stress of the above section the concluding portion thereof, to-wit:

> "in the same manner as constructive service is had in other cases at law."

And then quoting from the Wyoming Compiled Statutes of 1920, Section 4873, the subject of which is "JUDGMENT ON CONSTRUCTIVE SERVICE," it reads as follows:

> "When the debtor has not been personally served with process according to law, but has been lawfully notified by publication, the judgment if for the plaintiff shall be that he recover the amount of indebtedness found to be due and the costs of suit to be levied out of the property charged with the lien therefor, which said property shall be specifically described in said judgment."

We respectfully submit that a complete answer to the statement of counsel is found in the case of Cadle, plaintiff in error, v. McLimans, defendant in error, by the Supreme Court of Wyoming, 23 Wyo. 515, 153 Pac. 901-3, a case wherein

> "plaintiff in error was made a defendant in the District Court, and in the petition relief was prayed against him, and by the order and judgment of the District Court he was required to forthwith pay into court a certain sum of money then in his possession,

and adjudged to pay his own costs in the case. That order and judgment he alleges was erroneous, and he seeks a reversal thereof * * *.

"The action in the district court is entitled 'Harry A. McLimans, plaintiff, v. Nettie Harmiston and S. P. Cadle, defendants.' The facts of the case, as we understand them from the record, are that on August 23, 1909, plaintiff purchased from one Bauman two lots upon which there was a mortgage in favor of defendant Harmiston for $200, which plaintiff assumed and agreed to pay, giving his note to her, which note contained the following statement: 'This note is given in lieu of a note heretofore given by J. A. Bauman and wife and secured by mortgage.' The Bauman note and mortgage were left in a bank, and afterwards by direction of Harmiston the claim was placed in the hands of defendant Cadle, who was and is an attorney at law. But whether he received the original note or only a copy of it from the bank does not clearly appear, nor is the evidence satisfactory as to what became of it, but tends to show that it was lost. It was long past due when plaintiff purchased the lots and gave his note for $200 to defendant Harmiston and which became due March 1, 1910. The deed to plaintiff for the lots was acknowledged before Cadle, and it appears that he retained possession of the mortgage and plaintiff's note, and on March 28, 1911, plaintiff paid to Cadle the amount due thereon ($230) and received his note, having written thereon, 'Paid in full Mch. 28, 1911,' and signed 'S. P. Cadle.' He also received from Cadle the mortgage and a copy of the Bauman note, each having written thereon and signed by defendant Cadle as attorney for Harmiston, a statement that they were fully paid and satisfied. It appears that Cadle was under the impression at the time that he as the attorney for Nettie Harmiston could cancel the mortgage by an entry on the margin of the record; but when he appeared for that purpose the clerk refused to allow him to do so without a power of attorney from the mortgagee. He informed plaintiff of that fact and endeavored to

secure a release from the mortgagee, but was then and ever since has been unable to locate her or to hear from her, and he still retains the money. Plaintiff testified that Cadle told him that he was attorney in fact for Mrs. Harmiston. That Cadle denied. Plaintiff also testified that at several times, when he inquired about it, Cadle told him he had not been able to locate Mrs. Harmiston. The relief sought against the defendant Harmiston, who was a nonresident of the state and was served by publication and made default, was to have the mortgage indebtedness decreed paid, the mortgage satisfied of record and to recover $100, the penalty provided by section 3696, Comp. Stat., 1910, for the failure of the mortgagee to cancel the mortgage of record. The relief sought against defendant Cadle, who appeared and filed his separate answer, will perhaps best appear by setting out a copy of the prayer of the petition," * * *

which we do not deem it necessary to quote, and the Court at the conclusion of the trial entered a decree canceling the mortgage, clearing plaintiff's title to the lots against defendant Harmiston and made and entered an order against defendant Cadle as follows:

" 'That defendant S. P. Cadle be and he is hereby ordered and directed forthwith to pay into the clerk of this court, of and from the moneys now in his possession belonging to defendant Nettie Harmiston, the sum of $100, which sum said clerk is directed to pay unto plaintiff or his attorneys of record, the same being the penalty for the failure of defendant Nettie Harmiston to release said mortgage of record within the time provided by law after the satisfaction thereof,' and adjudged each party to pay his own costs. From the order and judgment against defendant Cadle, he appeals.

"Cadle's authority as attorney for defendant Harmiston to collect and receive the money is fully sustained by the evidence, and such payment to him extinguished the debt secured by the mortgage, and

the decree canceling the mortgage was properly entered and is not here complained of. But upon what theory Cadle could rightly be made a party defendant in that action, or upon what principle or rule of procedure he could be legally ordered to pay over money in his possession belonging to defendant Harmiston we are unable to see. If plaintiff had a claim against her for money and Cadle was her debtor, or had money belonging to her in his possion, the statute on attachment and garnishment provides a clear and ample method to reach it; but that method is not by making the debtor of the defendant, or person having money or property of defendant in his possession a party defendant in the action. The court in connection with the relief to cancel the mortgage could make no valid order disposing of defendant Harmiston's money in Cadle's possession until it acquired control over it by attachment, which was not done in this case; and the order so made was erroneous. No personal money judgment could be rendered against defendant Harmiston who was served by publication only, nor was such a judgment rendered against her. Aside from the action against defendant Harmiston to cancel the mortgage of record, the case seems to bear some resemblance to the incident recorded in the Gospel according to John, chapter [redacted] verse 3, and must have a similar result as in that instance."

(Said verse 3 is the following: "Simon Peter saith unto them, 'I go afishing.' They say unto him, 'We also go with thee.' They went forth and entered into a ship immediately; and that night they caught nothing.")

"The judgment of the district court in so far as it affects defendant Cadle is reversed and the cause remanded, with directions to vacate the order and judgment against him, and to enter an order dismissing the action as to him at plaintiff's cost.

"Reversed and remanded, with directions."

It is because of what the Wyoming Supreme Court has said in the foregoing case, as to the necessity for bringing the Harmiston money within the Court's jurisdiction and under its control by attachment or garnishment; its saying that the trial court was without authority to have rendered a money judgment against Mrs. Harmiston (which it did not, however, assume to do), *because the service upon her was by publication only, and that no procedural attempt even had been made in an endeavor to bring the money within the Court's jurisdiction or under its control, just as in the case at bar, though it was at all times in the possession of Cadle who had been sued and was before the Court, that we are so insistent* that the Wyoming judgment in the case at bar is *void and a nullity* as to the property of Meyer which was at all times in Colorado and not within the jurisdiction of the Wyoming Court and that he, Meyer, having been *constructively* served, with a copy of the petition and a copy of the summons, in the City and County of Denver, Colorado, was in effect and in fact served *only as though by publication.*

It is elementary and needs no citation of authorities that the res must be in the state where the Court is sitting or by proper procedural or remedial process brought into the jurisdiction of the Court and under its control, or otherwise the Court is conclusively without jurisdiction thereof.

COLORADO SUPREME COURT HAS NOT LIMITED THE GROUND OR BASIS OF ITS DECISION FOR HOLDING THE WYOMING COURT'S JUDGMENT VOID AS IS STATED IN PETITIONERS' BRIEF.

The brief of petitioners in support of their application for a Writ of Certiorari, at pages 28-29 under their subdivision "b," says:

"The Colorado Supreme Court held void the Wyoming judgment solely upon the ground that after the Court found that Milliken had assigned to the Transcontinental Company his claim against Meyer in the agreement of May 3, 1924, it could not then enter judgment upon the claim in favor of Milliken (R. 232). It must be remembered that the assignee of the claim, Transcontinental Oil Company, was before the Wyoming Court and had pleaded this contract in defense of the cause of action asserted against it by Milliken. The attorneys for the Transcontinental Company approved the form of the Wyoming judgment (R. 39). One of the petitioners herein, The Ohio Oil Company, pleaded in this cause, as a third defense and as a cross-complaint against the Millikens, the aforesaid agreement of May 3, 1934 (R. 83). It thus appears that the assignee of Milliken was a party to the Wyoming case and did not object to the entry of the judgment against Meyer upon the assigned claim. Likewise the successors in interest of such assignee were parties to this cause and one of them has specifically pleaded the May 3, 1924, agreement (R. 95). Meyer may not defeat the claim of Milliken by relying upon the assignment when both the assignor and the assignee were parties to the litigation and make no objection to the judgment in favor of the assignor upon the assigned claim."

We have the impression that the pleadings in a case are the things which advise the Court as well as counsel for the opposing party or parties just what is in controversy and being litigated in the case; and there are no pleadings in the case at bar that by any stretch of the imagination can be said to justify such construction as counsel for petitioners contend for.

They say in attempted justification that

"The attorneys for the Transcontinal Oil Company approved the form of the Wyoming judgment (R. 39)."

Those attorneys did *not* represent Mr. Meyer, but *did* represent Transcontinental Oil Company the alleged joint tort feasor in the Wyoming action and what they said or did is not binding on Mr. Meyer or his successor in interest, the Respondent herein.

In their said statement and at page 29 thereof, they make reference to the pleading (cross-complaint) of the petitioner, The Ohio Oil Company (R. 83), which (R. 82-85), folios 450-455, it is our pleasure to quote and is the following:

> "That on the 3rd day of May, 1924, in order to settle all controversies with said William B. Milliken, said Transcontinental Oil Company assigned to William B. Milliken, who received and accepted the same, a 1/32nd interest in the net profits from oil and gas operations on said 'Moffat Pool' and at the same time and as a part of the same transaction the said William B. Milliken together with one Carl S. Milliken, entered into an agreement with said Transcontinental Oil Company of Colorado, which agreement recites that said William B. Milliken and Carl S. Milliken assert and maintain that they are entitled to, and are the owners of an undivided 2/3rds interest in a certain 1/16ths of the net profits which may be derived from oil and gas operations and development which may be conducted upon the properties, permits or leases procured by R. D. Meyer and assigned to said Transcontinental Oil Company, under a contract dated August 31, 1922, which said last mentioned contract is set forth in paragraph Third of plaintiff's complaint herein between said R. D. Meyer and said Transcontinental Oil Company; that by said agreement of May 3, 1924, said William B. Milliken and Carl S. Milliken jointly and severally sold, assigned and transferred to said Transcontinental Oil Company all and singular their right, interest, claim and demand of every kind or nature as against the said R. D. Meyer in anywise pertaining to any and all lands in Moffat, Routt and Rio Blanco Counties, Colorado, or the 1/16th interest

in said net profits and the rights of said R. D. Meyer therein; that said 1/16th interest included the 1/64th interest now in dispute; that by reason of having assigned and transferred all his right, title and interest in said 1/16th interest in and to said net profits as aforesaid, said defendant William B. Milliken—and Margaret M. Milliken, as his assignee—were thereafter estopped to make any claims against this defendant as to said 1/64th interest of the net profits from production from said 'Moffat Pool' and were not then, or thereafter, and are not now entitled to any part of the 1/64th interest in said net profits so retained by this defendant in a special fund or account as aforesaid; that the payments so made by this defendant to said Margaret M. Milliken, as hereinabove set forth, covering the 1/64th interest of said net profits were made by mistake of fact to the wrong person without any consideration moving from said Margaret M. Milliken or William B. Milliken and because of forgetfulness of said agreement of May 3, 1924, and when nothing was due or owing to said Margaret M. Milliken or William B. Milliken under any contract between them or either of them and said Transcontinental Oil Company or this defendant; that the same constituted an unjust enrichment of Margaret M. Milliken and William B. Milliken and in equity and good conscience the same should be repaid by said Margaret M. Milliken and William B. Milliken to this defendant, together with legal interest thereon from the respective dates of said payments.

V.

"That on or about the 29th day of November, 1935, this defendant demanded of defendants Margaret M. Milliken and William B. Milliken that said sums of money so paid to Margaret M. Milliken be repaid to this defendant, The Ohio Oil Company.

VI.

"That neither of said defendants, Margaret M. Milliken nor William B. Milliken, has repaid to this defendant the said money, nor any part thereof."

In said statement they also refer to the agreement of May 3, 1924 (R. 95), which is the following together with this allegation, "and said 1/64th was at no time owned by or subject to assignment by William B. Milliken and Carl S. Milliken or either of them, to said Transcontinental Oil Company."

(R. 95), "NOW, THEREFORE, for and in consideration of the sum of Ten (10.00) dollars and other good and valuable considerations passing from the said second party to the said first parties, and the receipt of which is hereby acknowledged, the said first parties and each of them jointly and severally, have sold, assigned and transferred and do hereby sell, assign and transfer unto the said party of the second part, all and singular their right, interest, claim and demand, of every kind or nature, as against the said R. D. Meyer in anywise pertaining to any and all lands in Moffat, Routt and Rio Blanco counties, Colorado, or the one-sixteenth (1/16) interest in said net profits, and the rights of said R. D. Meyer therein; and said 1/64th was at no time owned by or subject to assignment by William B. Milliken and Carl S. Milliken, or either of them, to said Transcontinental Oil Company."

And said assignment, among other things, shows that the property involved in this litigation was *not* within the jurisdiction of the Wyoming Court but was and is in the State of Colorado and *without* the Wyoming Court's jurisdiction, which is *also* disclosed by Respondent's Ex. "R" (R. 159).

THE WYOMING SUPREME COURT'S OBSERVATIONS AND HOLDINGS AS TO THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION AND STATUTES.

We ask attention to a Wyoming Supreme Court case which was brought based upon a judgment secured in a

Nebraska County Court, and is one wherein counsel for plaintiff in error relied almost wholly, as is said, upon the "full faith and credit" clause of the United States Constitution and Statutes.

We deem the expressions of the Wyoming Supreme Court of much importance in view of the fact that petitioners' contention in the case at bar is that full faith and credit was not given by the Colorado Supreme Court to the Wyoming District Court judgment.

The case to which we refer is Bank of Chadron v. Anderson, which was twice in the Supreme Court of Wyoming—first reported in 6 Wyo. p. 518, 48 Pac. 197; and on the occasion of its second visit to that Court the proceedings are reported in 7 Wyo. p. 441, 53 Pac. 280, and it is from the Pacific reports we shall quote.

We shall undertake to read from these Pacific reports only such matters as are pertinent to the issues in the case at bar as there is much concerning records and pleadings discussed which is not pertinent to the case at bar.

As the syllabus is by the Court pursuant to authority of Wyoming Statutes, it will be observed that we are within our rights in reading from the syllabi and 4. thereof is the following:

> "4. A judgment of a sister state, when sued on in this state, may be impeached for want of jurisdiction of the person; and fraud in its procurement may be interposed as a defense thereto if such defense would have been permissable in a suit upon the judgment in the state where it was rendered. Such defense may be interposed in a suit upon a judgment rendered by a county court in the state of Nebraska."

6. of the syllabi reads:

"6. The fact that the Nebraska judgment was rendered for a greater sum than was endorsed upon the summons, and in excess of the amount which was actually due, was at least competent, in connection with all other circumstances, upon the issue of fraud in the procurement of such judgment."

"7. *Held*, that the evidence is sufficient to support the finding of the court that there existed a valid defense to the former action, the judgment wherein was sought to be vacated."

"9. Shortly after the execution and delivery of certain promissory notes, suit was brought by the maker in the District Court of Dawes County, Neb., against the payees and the one claiming to hold them as collateral security for an antecedent debt of the payees, to obtain the cancellation of the notes and enjoin their collection. Pending that suit the said alleged holder commenced an action upon the notes in the county court of the same county, without making any reference to the pending suit in the pleadings, and obtained a judgment by default. Subsequently a final decree was rendered in the suit in the district court, perpetually enjoining the original payees from transferring or collecting the notes, and enjoining the party claiming to hold them as aforesaid from transferring or collecting the same except to the extent of its interests acquired prior to the commencement of such injunction suit. *Held* that, as between the two judgments, the decree in the district court must prevail, as that court first acquired jurisdiction of the subject-matter and the parties, and, in a suit in this state upon the county court judgment, it is permissable for the defendant, in such suit to show that at the commencement of the suit in the district court aforesaid the alleged holder of the notes had not acquired any interest in the notes, and that, if no such interest had been acquired, that fact would constitute a valid defense to the judgment of the county court."

Following the filing of pleadings and the case being at issue, trial was had, and beginning in the ninth line from the bottom of page 198, left hand column, it is said:

> "* * * the court found that the plaintiff, Anderson, had a good and valid defense to said action; that the judgment was procured by said bank in a much greater sum than was due, by imposition, through its attorneys, both on the court and the defendant therein; and that said judgment was procured by undue means on the part of the bank against Anderson. It was thereupon ordered that said judgment be vacated and set aside, and that the action wherein it had been rendered to be placed upon the trial docket of said court, and stand for trial at the next regular term."

That is the occasion for another trial and a second appearance of that case in the Wyoming Supreme Court as previously suggested.

One of the contentions of petitioners in the case at bar is that the judgment of the Wyoming Court cannot be "collaterally attacked" and it is and at all times has been our insistence that the action instituted by Respondent to have the Wyoming Court judgment decreed to be void and a nullity, is not a collateral attack but a *direct* one.

The Wyoming Supreme Court says, reading from the left hand column, at page 200 of 48 Pac., beginning in line eleven:

> "The ground of the contention on the part of plaintiff in error seems to be that, inasmuch as the judgment of the Dawes county court in Nebraska is the foundation of the original suit in this state, that judgment cannot be impeached collaterally."

and then reading in the same column, beginning in line 17 from the bottom, the Court says:

"With reference to the collateral attack upon the judgment of the county court of Dawes County, Neb., the petition charges want of jurisdiction of the person, and that can always be questioned in a suit upon a judgment of a sister state. There has been much discussion in the courts of the United States and of the various states respecting the right to impeach such judgments for fraud in their procurement, by reason of the provisions of the constitution and statutes of the United States respecting the faith and credit to be given by each state to the public acts, records, and the judicial proceedings in the courts of other states; but the general trend of authority, and the great weight thereof, are in favor of allowing such a defense if it would have been permissable in a suit upon the judgment in the state where it was rendered; and such is the rule adopted in Nebraska. Eaton v. Hasty, 6 Neb. 419; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306."

and it appears from the decision from which we have been reading that the same rule prevails in Wyoming and that an endeavor to get all the facts justifies the extent to which the Colorado Supreme Court has gone in analyzing the decree of the Wyoming Court in the case at bar, as is disclosed in its opinion, and in particular the four pages of that opinion set out in our original brief herein opposing the application of petitioners for a Writ of Certiorari, by which brief we still stand and the law as therein set forth we continue to contend for as being the law applicable to the case at bar.

Reading further from the opinion and at page 201 of 48 Pac., left hand column, and beginning in line 3 from the top of the page, it is said:

"* * * Nevertheless, upon an inspection of the evidence, we are of the opinion that it is sufficient to support the finding of the court that the plaintiff had a valid defense to the former action, the judgment wherein was sought to be vacated. The evi-

dence tends at least to show that fraud had been practiced in procuring the Nebraska judgment upon the notes. An affirmance of the judgment of the district court in the present cause will result in a new trail of the former action, upon which trial the evidence already adduced will be again used, and must then receive consideration. We do not deem it advisable to discuss the same in detail, nor at all in respect to a mere question of fact. In respect, however, to the effect of the judgment of the district court of Dawes County, Neb., upon the judgment of the county court of the same county, it is proper that we express our views.

"The impregnable character of the county court judgment, when sued on in this state, is strongly urged upon our attention, and counsel for plaintiff in error rests his case almost entirely upon the proposition that such judgment must be accepted without question in the courts of this state. We are inclined to the opinion that the evidence shows jurisdiction of the subject-matter and of the person of Anderson in that Court, but its judgment may nevertheless be impeached for fraud; and we are inclined to view the various irregularities connected with the exercise of its jurisdiction in that court as matters affecting the charge of fraud, rather than as being jurisdictional matters. There is, however, another Nebraska judgment in this case, to which the same faith and credit must be given as to the one upon which plaintiff in error relies. The record of the decree of the district court enjoining the collection or transfer of the notes does not show the date when it was rendered, except by a filing mark of the clerk, nor the date when the suit was commenced; but Mr. Fisher, counsel for plaintiff in error, and a party to the suit in the district court, was a witness upon the trial of this case, and testified that the injunction suit was commenced on or about July 20, 1888, and that the decree was rendered June 23, 1892; and, as to the date of the decree, the filing mark upon the back of the copy of the decree brought into the record agrees

with the statement of the witness. The suit in the county court upon the notes was commenced in August, 1891, and judgment was rendered therein on the 8th day of March, 1892. The subject of the suit in the district court was the same notes upon which suit was brought in the county court, but in the former the cancellation of the notes and an injunction against their collection and transfer was sought; and in the latter the defendants in the former—one of them as party, the other as attorney—sought judgment upon the notes. In the former suit, which was not concluded by final decree until June, 1892, the original payees were enjoined from transferring or collecting any of said notes, and the bank was enjoined from transferring and collecting them, excepting as to such interest as it may have acquired prior to the commencement of that suit. It is conceded that the basis of the judgment in the county court was the notes the collection of which was sought to be enjoined in the suit in the district court, and which was so enjoined to the extent aforesaid by a decree subsequent to the judgment of the county court. In the suit upon this last-mentioned judgment in the courts of our state, seeking thereby to collect said notes, although they may have merged in a judgment, the injunction decree may be interposed as a defense." * * *

We read now from the right hand column, same page, beginning at line eleven from the bottom of said page where it is said:

"* * * Taking the two judgments together, then, the question becomes an open one for consideration, whether the bank had any interest in the notes prior to the commencement of the injunction suit. If the notes were not indorsed at the time its cashier and manager had notice of the facts, the bank had not then any interest as against the defense of want of consideration, and could not thereafter acquire any. It was by the decree of a competent court perpetually enjoined from collecting such notes, except as to such interest as it had acquired prior to

the injunction suit. The absence of any such interest may be shown in the suit in the district court of Weston county brought upon the judgment; the injunction affecting its collection, as well as the notes upon which it was founded. Otherwise the courts of this state would be giving full faith and credit to one judgment of another state, and denying the same to another judgment of the same state concerning the same subject-matter," * * *

"The judgment is affirmed."

We now read from the second opinion of the Wyoming Supreme Court in the case of Bank of Chadron v. Anderson and from the Pacific citation, and we read at page 281, right hand column of 53 Pacific, beginning with the word "summarized" about the middle of the column where it is said:

"* * * Summarized, the findings of the trial court are: First, that the county court of Dawes County, Neb., had jurisdiction over the person of the defendant, and of the subject-matter of the controversy; second, that the judgment sued on was rendered for $161 in excess of the amount of notes and interest, and that such excess was fraudulently caused to be added to the judgment by plaintiff's counsel in that action, and, generally, that the judgment was procured by fraud on the part of the plaintiff and its counsel; third, that the notes were not purchased by plaintiff in good faith, or for a valuable consideration, and without notice of the defense of Anderson thereto; fourth, that the notes were not indorsed by the payees until after plaintiff had been fully advised by Anderson that they had been procured by fraud and were fraudulent, and that he had a valid defense thereto; and, fifth, that plaintiff had not at any time any legal or valid interest in, or title to, the notes, as against the maker thereof, and was not, and is not, entitled to recover any amount whatever from the defendant Anderson upon the notes, or the judgment of the county court,

nor under the terms of the decree rendered by the district court of said Dawes County, Neb. The point insisted on is that, as the court found the county court to have possessed jurisdiction over the person of defendant and the subject-matter of the action, none of the other facts found are sufficient to impeach the judgment rendered by that court, and sued upon in the present action. We held when the case was here before that the judgment could be impeached for fraud in its procurement. That question was fully discussed in the opinion then filed, and we adhere to the views therein expressed. The trial court found that the judgment was procured by fraud, and having so concluded, found from the evidence that the notes themselves were fraudulently obtained, and that the plaintiff was not an innocent holder thereof, for value, without notice. If the judgment was fraudulently obtained, then every defense which the maker of the notes had as against the bank might properly be shown upon the trial. * * * We are therefore unable to assent to the proposition that the judgment is improper, as based upon the findings. If the findings are correct,—and, for the reasons already stated, we must assume them to be so,—the appropriate judgment was rendered."

"Affirmed."

Counsel, at page 20 of their brief, in discussing the "full faith and credit" clause, state, near the bottom of said page, that

> "It is also well settled that notwithstanding the full faith and credit provision of the United States Constitution it may be shown in a collateral proceeding that the court in any state which renders a judgment did not have jurisdiction."

and in the Appendix to our brief filed in opposition, we cite "H," page 28, Black on Judgments, Vol. 2, 2d ed., Sec. 901, where it says in particular:

"It is fair to infer that the constitution mean no more than that full faith and credit shall b given to the valid and lawful judgments of th courts of a sister state."

which, we respectfully submit, is a *reasonable* construc tion, but it is and has at all times been the position of Re spondent and her attorneys that the Wyoming judgmen concerning which we complain, *is neither valid nor lawfu*

We respectfully submit that the Writ of Certiora should be dismissed.

W. E. CLARK,
FRED S. CALDWELL,
Attorneys for Responden

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IN THE

Supreme Court of the United States

October Term 1940

No. 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

PETITIONERS,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased, RESPONDENT.

PETITION FOR RE-HEARING.

Mr. Justice Douglas delivered the opinion of the Court.
(December 23, 1940)

W. E. CLARK,
FRED S. CALDWELL,
Suite 402-408 Midland Savings Building, Denver, Colorado,
Counsel for Respondent.

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VIOLET L. MEYER, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased, RESPONDENT.

PETITION FOR RE-HEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In accordance with Rule 33 of this Honorable Court, the Respondent, Violet L. Meyer, both individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, deceased, respectfully presents this her petition for rehearing, and as grounds therefor says:

THE FOLLOWING STATEMENT APPEARING IN LINES 3, 4 AND 5 FROM THE TOP OF PAGE 2 OF THE OPINION: "MEYER WHO WAS ASSERTED TO BE A RESIDENT OF WYOMING, WAS PERSONALLY SERVED WITH PROCESS IN COLORADO PURSUANT TO THE WYOMING STATUTE;[3]" AND THE FURTHER STATE-

MENT APPEARING IN LINES 6, 7 AND 8 FROM THE TOP OF PAGE 5 OF THE OPINION: "WHILE OUTSIDE THE STATE, HE (MEYER) WAS PERSONALLY SERVED IN ACCORDANCE WITH THE STATUTORY SCHEME WHICH WYOMING HAS PROVIDED FOR SUCH OCCASIONS"; AND THE LAST SENTENCE OF THE OPINION: "HERE SUCH A REASONABLE METHOD WAS SO PROVIDED AND SO EMPLOYED": ARE ERRONEOUS STATEMENTS OF THE WYOMING LAW AND STAND CONTRADICTED BY THE RECORD.

The pertinent provisions of the Wyoming statute are set forth in note 3 on page 2 of the opinion, as follows:

> "[3]Wyo. Comp. Stat. 1920, § 5636 provided: 'Service by publication may be had in either of the following cases: . . . 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent.'"
>
> Section 5641 provided:
>
> "'Personal service out of state: In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons.'"

According to the plain wording of these statutory provisions the law of Wyoming is that service by publication upon a citizen of Wyoming will support a judgment in personam only upon the existence of one or more of these

grounds which are conditions precedent to such constructive service, viz.: the defendant Wyoming citizen, or legal resident, must have departed from the county of his residence in Wyoming with the intent to delay or defraud his creditors or to avoid the service of summons, or he must keep himself concealed with like intent. A mere reading of the Wyoming statute is sufficient to show that it does not make *mere absence from the state* ground for constructive service in an action in personam. And obviously any concealment by such defendant for the purpose of avoiding the service of summons must be a concealment within the State of Wyoming, because a writ of summons issued by a Wyoming court will run only within the territorial limits of the State of Wyoming. And a fortiori the only concealment the Wyoming statute could possibly contemplate would be concealment from a Wyoming process server. It therefore follows that if Meyer did not depart from the county of his residence (a purely fictitious legal residence imposed by law) in Wyoming, "with the intent to delay or defraud his creditors or to avoid the service of summons," he could not be served by publication under the Wyoming statute. And if Meyer was not subject to service by publication under the Wyoming statute, then the "personal service of a copy of the summons and the petition in said action" could not be legally made on him out of the state, because the Wyoming statute expressly limits such personal service out of the state to "cases where service may be made by publication under the provisions of this chapter."

In his petition filed in the Wyoming court on July 26, 1927, (record, folios 34-35), Milliken expressly stated and alleged the things concerning Meyer's then physical residence in Colorado and his then physical absence from the state of Wyoming, which appear *infra* in the left hand column. And eight months later, Milliken's attorney in his affidavit for constructive service by publication (record, folio 192), made the statements concerning Meyer's asbence from the State

of Wyoming, and his then post office address in Denver, Colorado which appear *infra* in the righthand column:

(Record, folios 95-97):

"That said defendant Meyer, in taking out certain permits in the name of the plaintiff covering unfavorably located lands within the Hamilton and Isles structures, showed plaintiff's address as being at 1114 Logan St., Denver, Colorado, when in truth and in fact, *said address was the residence of the said Meyer*, and was not the address of said plaintiff, and this was well known to the said defendant Meyer; all mail, therefore, addressed to the plaintiff by the United States Land Office touching said Hamilton and Isles structures, or any of the lands contained therein, went to the defendant Meyer, and was never received by the plaintiff, and plaintiff, for many months after the transactions above set forth, understood and believed that filings had been made and permits issued in keeping with the understanding had between himself, the defendant Meyer and the said Hagen."

(Record, folio 193):

"*That since the filing of this action said defendant has remained out of the State of Wyoming* and has concealed himself, and now conceals himself to avoid the service of the summons issued out of the above named court in this cause, and since the filing of this suit, said defendant has and he does now so conceal himself that such process cannot be served upon him.

"That this action is brought for an accounting between co-joint-adventurers and to cancel and set aside a contract entered into between the plaintiff and the defendant, Transcontinental Oil Company, arising out of a joint adventure enterprise, and which said contract plaintiff was induced to enter into through the fraud of the defendants, Transcontinental Oil Company and R. D. Meyer, as co-joint-adventurers;

"That this action is one of those mentioned in Section 5636, Wyoming Compiled Statutes, 1920;

"That the present post office address of said defendant, R. D. Meyer, is Denver, Colorado.

C. R. ELLERY

"Subscribed and sworn to before me this 26th day of March, 1928.

M. Cryderman,
Notary Public."

We concede that as stated in the opinion:

"'Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable' from the various incidences of state citizenship. See Lawrance v. State Tax Commission, 286 U. S. 276, 279; New York ex rel. Cohn v. Graves, 300 U. S. 308. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him. See Restatement, Conflict of Laws, §§ 47, 79; Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427."

But the State of Wyoming has seen fit to so word and draft its law governing service by publication in actions against its citizens who may be beyond its territorial limits, that its courts cannot obtain jurisdiction of their persons, either by publication or by personal service of summons outside

the state except: "in actions where the defendant * * * has departed from the county of his residence *with the intent to delay or defraud his creditors, or to avoid the service of summons, or keeps himself concealed with like intent.*" In other words, *something more than mere absence from the state* is required by the Wyoming statute before an action in personam can be maintained against one of its absent citizens upon service by publication or personal service of summons outside the state. And in the instant case, it affirmatively appears upon the face of the record that Meyer, long prior to the commencement of Milliken's action, had established and continuously maintained his home, his place of abode, the place where he and his family lived, his actual physical residence, at No. 1114 Logan Street, Denver, Colorado. And at the time Milliken's action was commenced, Meyer did not have, and for years prior thereto he had not had or maintained a home, living quarters or a place of abode within the State of Wyoming. Obviously, therefore, Meyer although by legal fiction he continued to be a citizen and legal resident of Wyoming, had not departed from the county of his residence in Wyoming *"with the intent to delay or defraud his creditors, or to avoid the service of summons."* Therefore, conceding that the State of Wyoming might enact a law that would support a judgment in personam against one of its absent citizens upon personal service made out of the state, *merely upon the ground of such absence*, the fact is, *Wyoming has not as yet seen fit to enact such a law.*

It is true in the instant case, that Meyer was a citizen and, by fiction of law, a legal resident of Wyoming at the time Milliken brought his action in the Wyoming court. It is also true that Meyer was then absent from the State of Wyoming. And if this court can so read and construe the Wyoming statute as to authorize a judgment in personam against Meyer by the Wyoming court upon personal service of summons made upon him in Colorado, *merely upon the ground that he was absent from Wyoming*, then the opinion as an-

nounced should stand. Otherwise this petition for re-hearing should be granted.

Respectfully submitted,

W. E. CLARK,
FRED S. CALDWELL,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, FRED S. CALDWELL, as one of counsel and attorney of record for the Respondent herein, do hereby certify that the within and foregoing petition for rehearing, which was prepared by me personally, is presented in good faith and not for delay.

Fred S. Caldwell.

FRED S. CALDWELL,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 66.—October Term, 1940.

William B. Milliken, Margaret M. Milliken, Texas Production Company, et al., Petitioners, *vs.* Violet L. Meyer, Both Individually and as Administratrix with the Will Annexed of the Estate of Raymond D. Meyer, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Colorado.

[December 23, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

The Colorado Supreme Court held null and void a judgment of the Wyoming court against the claim of Milliken that that judgment was entitled to full faith and credit under the federal constitution. 101 Colo. 564; 105 Colo. 532. The case is here on a petition for certiorari which we granted because of the substantial character of the federal question which is raised.

The controversy is over a 1/64th interest in profits from operation of certain Colorado oil properties. Transcontinental[1] on August 31, 1922, contracted to pay Meyer 4/64ths of those profits. Milliken asserted a claim to a two-thirds interest in that 4/64ths share. As a settlement of that dispute Transcontinental on May 3, 1924, contracted to pay Milliken a 2/64ths interest and Milliken assigned[2] to Transcontinental all his claims against Meyer pertaining to the lands in question and to Meyer's 4/64ths interest in the profits.

Later Milliken instituted suit in the Wyoming court alleging a joint adventure with Transcontinental and Meyer and charging a

[1] Transcontinental Oil Co. In June, 1923, Transcontinental had disposed of a one-half interest in the properties in question to Texas Production Co. In April, 1931, Ohio Oil Co. acquired the remaining interest of Transcontinental in the properties.

[2] Milliken's son, Carl S. Milliken, had an interest in the Milliken claim which he likewise assigned to Transcontinental.

conspiracy on their part to defraud him of his rights. He sought a cancellation of the contracts of May 3, 1924, and an accounting from Transcontinental and Meyer. Meyer, who was asserted to be a resident of Wyoming, was personally served with process in Colorado pursuant to the Wyoming statutes;[3] but he made no appearance in the Wyoming cause.[4] Transcontinental appeared and answered. The court found that there was no joint venture between Milliken and Transcontinental; that the contracts of May 3, 1924, were valid; and that the action against Transcontinental should be dismissed with prejudice. It found, however, that there was a joint venture between Milliken and Meyer; that they were entitled to share equally in 6/64ths of the net profits; and that, while Meyer had regularly received 4/64ths, he had refused to account to Milliken for his 1/64th part. The court did not purport to decree the 1/64th interest to Milliken or anyone else but entered an *in personam* judgment against Meyer for the profits which Meyer had withheld from Milliken, together with interest thereon; and enjoined Transcontinental from paying, and Meyer from receiving, more than 3/64ths of the net profits. This was on July 11, 1931. Thereafter the 1/64th share was withheld from Meyer and paid over to Milliken.[5] In 1935 respondent instituted this suit[6] in the Colorado court pray-

[3] Wyo. Comp. Stat. 1920, § 5636 provided: "Service by publication may be had in either of the following cases: . . . 6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."

Sec. 5641 provided:

"Personal service out of state. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state, and such summons when issued for service out of the state, shall be returnable at the option of the party having it issued, on the second, third or fourth Monday after its date, and shall require the defendant or defendants named therein to answer the petition in said action on or before the third Saturday after the return day named in said summons."

[4] His deposition, however, was taken on oral interrogatories concerning his legal residence in Wyoming.

[5] By the Ohio Oil Co. one of the vendees of Transcontinental. These payments were to Margaret M. Milliken to whom Milliken's interests had been assigned.

[6] Texas Production Co. and Ohio Oil Co. were joined as defendants. They filed separate answers and cross-complaints which are not material here. It should be noted, however, that the Ohio Oil Co. in its answer set up the contract between Milliken and Transcontinental whereby Milliken assigned all of his rights against Meyer in the lands and the 4/64ths interest in question to Transcontinental and alleged that Milliken was estopped thereby to make any claims against it for the disputed 1/64th interest.

ing, *inter alia,* for a judgment against Milliken for the sums withheld under the Wyoming judgment and paid to Milliken, for an injunction against Milliken attempting to enforce the Wyoming judgment, and for a decree that the Wyoming judgment was a nullity for want of jurisdiction over Meyer or his property. The bill alleged, *inter alia,* that Meyer at the time of service in the Wyoming court had long ceased to be a resident of Wyoming and was a resident of Colorado; that the service obtained on him did not give the Wyoming court jurisdiction of his person or property; and that such judgment was violative of the due process clause of the Fourteenth Amendment. Milliken's answer alleged, *inter alia,* that Meyer was a resident of Wyoming at the time of the Wyoming action and that the Wyoming judgment was entitled to full faith and credit in Colorado under the federal constitution. The Colorado court, on issues joined, found that Meyer was domiciled in Wyoming when the Wyoming suit was commenced, that the Wyoming statutes for substituted service were constitutional, that the affidavit for constructive service[7] on Meyer was filed in good faith, substantially conformed to the Wyoming statute and stated the truth, that Wyoming had jurisdiction over the person of Meyer, that the Wyoming decree[8] was not void, and that the bill should be dismissed.

That judgment was reversed by the Supreme Court of Colorado. It did not pass on the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter. It held that the Wyoming decree was void on its face because of an irreconcilable contradiction between the findings and the decree. In its view the finding of the Wyoming court that Milliken's assignment of May 3, 1924, to Transcontinental of his claims against Meyer was valid, deprived the court of any ground upon which it could predicate a judgment against Meyer, since the only basis for an action by Milliken against Meyer rested upon the claim before its assignment.

[7] While the affidavit for constructive service stated in accordance with § 5636 of the Wyoming Comp. Stat., *supra,* note 3, that Meyer concealed himself in order to avoid service of summons, the present record does not show whether or not the Wyoming court so found.

[8] The Wyoming judgment does not seem to have been proved by respondents in accordance with the provisions of R. S. § 905, 28 U. S. C. § 687 in their suit in Colorado to set it aside. Nor was that judgment so proved by the answers. But since the Colorado trial court gave the Wyoming judgment full faith and credit despite lack of such proof, respondents cannot here claim that that was error.

Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry. *Grover & Baker Sewing Machine Co.* v. *Radcliffe,* 137 U. S. 287; *Adam* v. *Saenger,* 303 U. S. 59. But if the judgment on its face appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself." *Adam* v. *Saenger, supra,* at p. 62. In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy* v. *Lum,* 210 U. S. 230; *Roche* v. *McDonald,* 275 U. S. 449; *Titus* v. *Wallick,* 306 U. S. 282. Whatever mistakes of law may underlie the judgment (*Cooper* v. *Reynolds,* 10 Wall. 308) it is "conclusive as to all the *media concludendi*". *Fauntleroy* v. *Lum, supra,* at p. 237.

Accordingly, if the Wyoming court had jurisdiction over Meyer, the holding by the Colorado Supreme Court that the Wyoming judgment was void because of an inconsistency between the findings and the decree was not warranted.

On the findings of the Colorado trial court, not impaired by the Colorado Supreme Court, it is clear that Wyoming had jurisdiction over Meyer in the 1931 suit. Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state (*Huntley* v. *Baker,* 33 Hun. 578; *Hurlbut* v. *Thomas,* 55 Conn. 181; *Harryman* v. *Roberts,* 52 Md. 64) as well as where he was personally served without the state. *In re Hendrickson,* 40 S. D. 211. That such substituted service may be wholly adequate to meet the requirements of due process was recognized by this Court in *McDonald* v. *Mabee,* 243 U. S. 90, despite earlier intimations to the contrary. See *Pennoyer* v. *Neff,* 95 U. S. 714, 733; Burdick, Service as a Requirement of Due Process in Actions In Personam, 20 Mich. L. Rev. 422. Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably

calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (*McDonald* v. *Mabee, supra*) implicit in due process are satisfied. Here there can be no question on that score. Meyer did not merely receive actual notice of the Wyoming proceedings. While outside the state, he was personally served in accordance with a statutory scheme which Wyoming had provided for such occasions. And in our view the machinery employed met all the requirements of due process. Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service. As in case of the authority of the United States over its absent citizens (*Blackmer* v. *United States*, 284 U. S. 421), the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. "Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable" from the various incidences of state citizenship. See *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by mere absence from the state. The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incidence of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him. See Restatement, Conflict of Laws, §§ 47, 79; Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427. Here such a reasonable method was so provided and so employed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.